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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLARENCE W. ARRINGTON,
Petitioner,

vs.

THE NEW YORK TIMES COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Dated: November 15, 1982

QUESTIONS PRESENTED

1. Whether the New York Court of Appeals erred in holding that the first amendment to the United States Constitution prohibits recognition of a privacy cause of action against a newspaper that publishes a full-page photograph of a nonpublic person, without his consent, to illustrate an article in its Sunday magazine section with which the person has no connection.

2. Whether the right to privacy under the United States Constitution requires a state to protect a nonpublic person against appropriation of his photograph to illustrate an article with which he has no connection.

PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff-appellant below.

Respondent The New York Times Company, a corporation and publisher of the photograph, was one of four defendants-respondents below. The others were Gianfranco Gorgoni, an individual and the photographer, Robert Pledge, an individual and Gorgoni's agent, and Contact Press Images, Inc., a corporation of which Pledge is president.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner, Clarence W. Arrington ("Arrington"), respectfully prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of New York entered on April 7, 1982. The Court of Appeals of New York upheld dismissal of the complaint against The Times, which commissioned and published Arrington's photograph. The court below, however, held that Arrington had a cause of action against the other respondents, who took the photograph at the request of The Times.

OPINIONS BELOW

The opinion and order of the Court of Appeals of New York, reported at 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), are reproduced in Appendix A. The opinion and order of the New York State Supreme Court, Appellate Division, First Department, reported at 78 A.D.2d 839, 433 N.Y.S.2d 164 (1st Dep't 1980), are reproduced in Appendix C. The opinion of the New York State Supreme Court, New York County (Special Term), which is not

officially reported and unofficially reported at 5 Media L. Rep. (BNA) 2581 (Sup. Ct. N.Y. County 1980), is reproduced in Appendix D.

JURISDICTION

The order of the Court of Appeals of New York was entered on April 7, 1982. A timely petition for reargument was denied on July 2, 1982. (The orders of the Court of Appeals of New York denying reargument motions are reproduced in Appendix B.) On September 21, 1982, Justice Marshall extended the time for filing this petition to and including November 15, 1982. (Justice Marshall's order is reproduced in Appendix E.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions involved are the first, third, fourth, fifth, ninth, and fourteenth amendments to the United States Constitution, all of which are reproduced in Appendix F, except for the fourteenth amendment, which is set forth in relevant part only.

Statutory provisions involved are sections 50 and 51 of the New York Civil Rights Law, both of which are reproduced in Appendix G.

STATEMENT OF THE CASE

This case involves the issue of whether newspapers have the right to use private persons, without their prior knowledge or consent, as props or unpaid models to illustrate matters in which they have no involvement. On Sunday morning, December 3, 1978, petitioner Clarence Arrington, a young black professional, awakened to find that his photograph took up the entire front page of *The New York Times Magazine* ("*Times Magazine*") section, which had been disseminated to millions of persons in New York and throughout the country.

The photograph had been taken, without his knowledge, at random on the New York streets apparently because Arrington was a neatly dressed and attractive young black whose picture could serve as an effective illustration for an article criticizing the black middle class for allegedly turning their backs on the less-fortunate members of their race. Arrington had nothing whatever to do with the article. He was being used purely as a model for illustrative purposes. Indeed, among the first comments he received about the article were those of friends who assumed that he had cheapened himself by selling his photograph to illustrate an article whose views were entirely repugnant to his own. Arrington was outraged by this indifferent treatment of his personality and accordingly sought legal redress.

Arrington's complaint against the publisher, the photographer, the photographer's agent, and the agent's company alleged violations of New York's privacy statute, CIV. RIGHTS LAW §§ 50–51 (McKinney's 1976), the common law, and state and federal constitutional rights to privacy. Upholding dismissal of the complaint against the publisher on respondents' motions to dismiss for failure to state a cause of action, Judge Fuchsberg, writing for the Court of Appeals of New York, held that there could be no cause of action against the publisher under the New York privacy statute, the common law, and the United States Constitution. However, as to the other respondents, the court below held that the allegations of the complaint, if proven, would establish a cause of action. The court below did not expressly address Arrington's claim under the New York Constitution.

Facts About Arrington and Publication of his Photograph. Arrington has not sought, nor been the subject of, any coverage by the news media (R 69).[1] Arrington, 31 years old, is an alumnus of the Graduate School of Business at

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1. Record citations, which are made herein by citing "R" followed by the page or pages to which reference is made, are to the Record on Appeal before the Court of Appeals of New York. Petitioner has not requested that the Record on Appeal be certified and transmitted to this Court.

Columbia University; he worked for General Motors when the photograph was published (R 68) and now works for the Ford Foundation. Arrington's picture appeared as the front outside cover of the *Times Magazine* in connection with the article entitled *The Black Middle Class: Making It*, by William Brashler ("Brashler article" (R 35–R 49)).[2]

While all the facts surrounding the unauthorized taking and publication of Arrington's photograph are not known,[3] according to photographer Gorgoni's affidavit, Arrington's picture was among those taken by him, without requesting prior permission, pursuant to an assignment from The Times. In November 1978, The Times requested Gorgoni to photograph "well-dressed blacks on the street" for the cover of an upcoming article on the black middle class (R 63). Gorgoni submitted "over one hundred color transparencies," from which The Times selected two, including that of Arrington. Gorgoni billed The Times $1,600 (R 63–R 64).

Respondents never requested or received Arrington's permission to take, sell, and publish his picture. Indeed, before its appearance in the *Times Magazine*, Arrington was not even aware his picture had been taken (R 69). Arrington first learned of the use of his photograph on Sunday morning, December 3, when he was called and so informed by a person with whom he worked (R 69).

The Brashler Article. The central character of the Brashler article is a black prostitute-turned-receptionist; its central thesis is that "[t]he most celebrated Kerner Commission conclusion of 1968—'Our nation is moving

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2. By letter dated November 15, 1982 to the Clerk of this Court, petitioner's counsel filed a copy of the Brashler article, including the photograph.

3. The facts stated herein are based upon the allegations of the complaint, Arrington's affidavit, and the affidavits submitted by respondents Pledge and Gorgoni in support of their motions to dismiss. Apart from an attorney's affidavit attaching a copy of the Brashler article, The Times did not submit an affidavit.

toward two societies, one black, one white - separate and unequal'—has turned out to be only partially fulfilled" (R 38), and that there is now a growing "black middle/professional class" which is becoming less and less concerned about the plight of their less fortunate black brethren.

The characters in the Brashler article, said to be members of the "black middle/professional class," are portrayed as persons whose primary concerns, apart from the desire to remove themselves geographically and psychologically from the "ghetto," are to wear "three-piece Pierre Cardins" and to drive foreign cars such as Mercedes-Benz. According to Mr. Brashler, so important is a Mercedes-Benz to the "black middle/professional class" that one of them portrayed in the article is said to have been bothered for a whole day by not knowing that a neighbor of his also owns such a car (R 38).[4]

Those who saw Arrington's picture, including friends and colleagues, identified it with the Brashler article (R 79-80). Arrington has received highly critical comments for his seeming approval, by appearing as the front outside cover, of the views expressed in the Brashler article (R 70). Moreover, colleagues have asked him whether or not be is "moonlighting" as a model (R 70).

The Complaint. Arrington alleged that Gorgoni, without his knowledge or consent, took his picture; that Contact acting through Pledge sold that picture to The Times; and that respondents engaged in concerted action for the purpose of using Arrington's picture to promote the sale of the *Times Magazine* (R 30). The complaint further alleged that Arrington's picture was published, without consent, willfully and knowingly in New York and throughout the United States (R 31-32). Moreover, the complaint alleged that publication of Arrington's picture incorrectly conveyed the impression that he is a model who posed for the picture and identified him

4. The Brashler article has been the focus of sharp and acrimonious controversy in the news media (R 75-R 80). Involuntarily, Arrington has been dragged into that controversy.

with the views expressed in the Brashler article (R 31–32). The complaint requested injunctive relief and compensatory damages of $150,000 and punitive damages of $1,000,000 against respondents, jointly and severally (R 34).

The Proceedings Below. On respondents' motions to dismiss, the New York State Supreme Court, New York County (Special Term), held that Arrington did not have a cause of action for alleged violation of the New York privacy statute and granted him leave to file an amended complaint only against The Times not based upon an alleged violation of such statute. In Special Term's memorandum decision, Justice Louis J. Okin held that Arrington had a "right to plead a cause of action limited to a breach of [his] Constitutional right of privacy. . ." (A 48).[5] Justice Okin, however, denied Arrington's statutory claim against The Times, holding that publication of a picture in connection with an article of general interest was, as a matter of law, not "for advertising purposes or for the purposes of trade" within the meaning of the Civil Rights Law (A 44–45). The complaint against the other three respondents was dismissed because Justice Okin held that their activities related only to the taking of Arrington's picture and not to its publication, for which only The Times is responsible (A 48).

In its memorandum decision, the New York State Supreme Court, Appellate Division, First Department, reversed Special Term's grant of leave to file an amended complaint against The Times and affirmed dismissal of the complaint against the other respondents. Without stating any reason, the Appellate Division held that "Special Term ruled correctly that plaintiff has no cause of action under the Civil Rights Law . . ." (A 38). The Appellate Division also ruled that "constraining precedent" compelled it to hold that a common-law right of privacy does not presently exist in New York and that, where a constitutional privacy right exists, it is limited to "governmental action or intrusion into purely

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5. Citations to the Appendix to this petition are made by citing "A" followed by the page or pages to which reference is made.

familial matters [citing four cases from this Court only]" (A 39). In dissent, Justice Presiding Kupferman indicated that he would affirm Special Term's leave to file an amended complaint against The Times, because Arrington had stated a privacy cause of action (A 39–40).

The New York Court of Appeals held that there was a cause of action against the photographer, his agent, and the agent's company for taking and selling Arrington's photograph at the request of The Times, but declined to apply such ruling against The Times for publication of the photograph without Arrington's knowledge or consent. If Arrington were to prove a "nonconsensual selling of the photograph," the court reasoned, he will have established a cause of action against these respondents because they will have been shown to have engaged in "trade" within the meaning of the New York privacy statute (A 34).[6] Acknowledging that the other respondents acted at the behest of The Times (A 29), the court below stated that because they did not play the "part of publisher of the article" they could not share the "publisher's immunity..." (A 34–35).

Narrowly construing the New York privacy statute[7] because of "the values our State and Federal Constitutions bespeak in the area of free speech and free press" (A 31), the New York Court of Appeals held there could be no cause of action against The Times because Arrington's picture was used to illustrate an article of public interest and because it found that the mere fact Arrington was a middle class black was sufficient "real relationship" to the Brashler article to call into play the "publisher's immunity." On motions to dismiss the complaint, the court below found that Arrington has a "real

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6. Oddly, the reasoning of the court below would grant a privacy cause of action to the other persons photographed by Gorgoni whose pictures, although sold to The Times, were not selected for publication.

7. This statute was enacted in direct response to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). On the meaning of this case to the court that decided it, see O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 441 (1902).

relationship" to the Brashler article. Without establishing a relationship between Arrington and the particular conception of the black middle class discussed in the Brashler article, the court below found the presence of a "real relationship" in the fact that Arrington could be classified middle class (A 32).

In denying Arrington's claim for a common-law cause of action,[8] the court stated:

> There has been serious concern that, by sidestepping the safeguards which restrain the reach of traditional public defamation litigation, a false light approach could compromise the constitutional guarantee of freedom of the press [citations omitted].

(A 33).

Arrington's claim for a constitutional right of privacy was denied because "no State action is involved..." (A 35).

In sum, the court below held that, while Arrington had a legal remedy against the other respondents for violation of his privacy, he had none against The Times because that is "part of the price every person must be prepared to pay for a society in which information and opinion flow freely" (A 33).

REASONS FOR GRANTING THE WRIT

There are two reasons for granting a certiorari petition in this case. First, the court below incorrectly held that the first amendment precludes Arrington from having a legal remedy against The Times for violation of his privacy.

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8. The common-law right of privacy is recognized in all but few states. *See* Abrams, *The Press, Privacy and the Constitution*, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 13; COMMUNICATIONS LAW - 1978, at 257-71 (J. Goodale, Chrm'n, PLI); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804 (4th ed. 1976). New York is among those states not recognizing a common-law privacy right.

Second, the decision below, in so holding, violates Arrington's right of privacy under the federal Constitution.

This Court has held that in appropriate circumstances, present here, a person's privacy can be protected against intrusions by the press. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In denying a cause of action against The Times, the court below clearly erred. This Court should correct that error.

The importance of correcting that error is highlighted by the recurrence of privacy cases against media defendants in which lower courts are uncertain of the extent to which the first amendment bars a cause of action. *See, e.g., Gilham v. Burlington Northern, Inc.*, No. 73-1649 (9th Cir. May 27, 1975)(available Nov. 10, 1982, on LEXIS, Genfed library); *Uhl v. Columbia Broadcasting Systems, Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979). Significantly, on facts similar to those presented herein, other courts, contrary to the ruling below, have perceived no first amendment bar and have granted a cause of action. *See, e.g., Clark v. American Broadcasting Cos., Inc.*, 684 F.2d 1208 (6th Cir. 1982); *Leverton v. Curtis Pub. Co.*, 192 F.2d 974 (3rd Cir. 1951); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804 (W.D. Pa. 1972); *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948). *See also* Annot., 30 A.L.R. 3d 203, 223 (1970).

The decision below violates the right of privacy recognized under the federal Constitution. While the Court has held that "emanations" from several amendments to the United States Constitution establish a right of privacy, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), and while the Court has noted powerful arguments in support of a right to privacy, it has not had occasion prior to this case to decide on the extent to which the right of privacy bars appropriation by the media of a private person's photograph. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975). Recognition of a constitutional right to privacy, we submit, requires a state to protect a nonpublic person against appropriation of his photograph for use, without his consent, to

illustrate an article with which he has no connection.[9]

Point I - The First Amendment Does Not Prohibit a State From Declaring Unlawful the Appropriation by Publication of a Nonpublic Person's Photograph.

As shown above at pages 7–8, the New York Court of Appeals was obviously of the erroneous view that a privacy action against The Times would violate the first amendment.[10] Recognizing that Arrington's privacy has been violated, the court below held there was a cause of action against respondents, except The Times. While The Times is clearly overwhelmingly responsible for violating Arrington's privacy, the lower court held that The Times has a "publisher's immunity," but that Arrington has a cause of action against the other respondents, all of whom, the court below recognized, acted at the behest of The Times.

The only plausible reason the court below reached this result was its incorrect view that the first amendment bars a cause of action against The Times. Approximately one month before publication of the Brashler article, The Times requested Gorgoni to photograph well-dressed blacks such as Arrington walking in the streets and then, without consent, published Arrington's photograph with the Brashler article. A principal, such as The Times, is liable for the tort of an agent, such as Gorgoni, committed during the course of performing the

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9. The *Griswold* case was said by Dean Prosser to have overruled the narrow interpretation of the New York privacy statute reaffirmed and applied by the court below in this case. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 816.

10. The Times argued that such a ruling is precluded by the first amendment. *See* Brief for Defendant-Respondent The New York Times Company at 48–50, *Arrington v. N.Y. Times Co., et al.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982).

principal's work, even when the principal commits no independent wrong. *See American Society of Mechanical Engineers V. Hydrolevel Corp.*, 50 U.S.L.W. 4512, 4515 (U.S. May 17, 1982). A fortiorari, when, as here, the principal specifically directs the agent to commit a tort, the principal is unmistakably liable, directly or derivatively. Moreover, this is especially true when, as here, the principal and agent engaged in concerted action in committing the tort.

The court below held there was a "trade" transaction within the meaning of the New York privacy statute. In a trade transaction involving a sale, there must be a seller — here, Gorgoni — and purchaser — here, The Times. Since the court below held there was a cause of action against Gorgoni as seller, there must also be one against The Times as purchaser. Unless the statute makes only the seller liable or exempts a sale to a publisher from its coverage, neither of which is the case here,[11] the same statutory word ("trade") cannot have different meanings, depending on the identity of the person against whom it is applied. This would violate a well-recognized rule of statutory interpretation. *See State of Washington v. Comm'r of Internal Revenue*, No. 82-1108, slip op. at 7 (D.C. Cir. Oct. 19, 1982) ("[g]iving two meanings to the same term in the same section violates a cardinal rule of statutory construction"). Therefore, the only reason the court below did not recognize a cause of action against The Times was its mistaken view that The Times had a first amendment immunity.

This Court in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974), on facts similar to those herein, ruled that there is no first amendment bar to holding the publisher liable. Since the court below decided this case under an erroneous view of the requirements of the first amendment which led it to deny Arrington a cause of action against The Times, this Court should correct that legal error. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977).

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11. Indeed, the court below held there was no exemption for the other respondents because Arrington's photograph was sold to a publisher (A35).

Writing for the Court, Justice Stewart in *Cantrell* correctly held that a privacy action against a media defendant does not violate the first amendment. There, plaintiffs brought a privacy action against a newspaper publisher, its photographer, and one of its former reporters. Plaintiffs argued that their privacy had been violated as a result of inaccuracies contained in a "news feature" story about them published in the Sunday magazine section of the paper. The feature story contained "accompanying photographs." 419 U.S. at 247. Plaintiffs claimed that they were damaged because they suffered "outrage, mental distress, shame, and humiliation." *Id.* at 248.

The two plaintiffs whose claims were submitted to the jury recovered a verdict against all defendants. The court of appeals reversed, holding that "in the light of the First and Fourteenth Amendments, the District Judge should have granted the [defendants'] motion for a directed verdict as to all the [plaintiffs'] claims." *Id.* at 246–47.

This Court reversed, remanding to the court of appeals with direction to enter judgment affirming the judgment of the district court as to two of the three defendants. The verdict against the photographer in *Cantrell*, held the Court, could not stand because of insufficient evidence. *Id.* at 253 n. 5. The only legal issue the Court indicated *Cantrell* presented was the correctness of the district court's instruction to the jury that for plaintiffs to prevail they had to meet the "knowing-or-reckless-falsehood" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), adopted for false-light, privacy actions in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). 419 U.S. at 249–50. Since plaintiffs obtained a verdict without having objected to the jury instruction, the Court did not pass on the issue, stating:

> this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional

> standard announced in *Time, Inc. v. Hill* applies to all false-light cases. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.

Id. at 250–51.

In *Cantrell*, the Court held that the publisher, but not the photographer, could be held liable. The photographs taken by the photographer for the publisher in *Cantrell*, the Court reasoned, were accurate depictions of what he saw. The publisher, however, published the photographs in a way that presented plaintiffs in *Cantrell* in a false light. On substantially identical facts, the court below reached an opposite result: a cause of action was recognized against the photographer, but not the publisher. The holding in *Cantrell* clearly mandates a reversal of this flawed result. Moreover, this flawed result is made worse by the fact that, unlike random photographs taken by a free-lance photographer and subsequently sold for publication, the photographer in this case was specifically requested by The Times to do what he did — namely, photograph "well-dressed blacks on the street."

A person walking on a public street does not do so at the risk that he can, without knowledge or consent, be photographed and prominently displayed as the centerpiece of an article with which he has no connection. Without doubt, the right of privacy protects against such conduct, as the New York Court of Appeals has seemingly previously recognized. *See Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359 & 360 (1952) ("the individual may not be singled out and unduly featured merely because he is on the scene[;]" "[o]ne traveling upon the public highway ... may not be picked out of a crowd alone ... and unduly featured for public view").

Arrington's privacy would thus have been violated even had he agreed with the views of the Brashler article. That violation, however, was aggravated in that Arrington was dragged into a controversy that he was not involved in and associated with views in that controversy which he does not share. Only The Times is responsible for this egregious violation of

Arrington's privacy.[12] To hold, as the court below did, that the photographer, but not The Times, could be liable is unjust and contrary to the *Cantrell* ruling.

In denying a cause of action against The Times, the court below was in error when it concluded that publication of a nonpublic person's photograph to illustrate an article of public interest is protected by the first amendment (A 31-33). In focusing on the public interest nature of the Brashler article, the court below failed to give adequate consideration to Arrington's interest in not being associated with the article. This is wrong. Arrington is a private person who has not, voluntarily or involuntarily, become involved in a public controversy about the black middle class. While conceding the Brashler article is of public interest, Arrington's middle class background, in itself, does not permit The Times to drag him into a controversy about the contemporary nature of the black middle class.

In holding that Arrington's middle class background, without more, was sufficient to associate him with the Brashler article, the court below clearly erred. Arrington cannot legitimately be associated with the Brashler article unless there is a "logical nexus" between him and the article. *See Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980)(*per curiam*). To establish a "logical nexus," it must be shown, we submit, that Arrington is the sort of middle class black discussed in the Brashler article. This has not been shown. That Arrington, according to some definition of middle class, could be called middle class is insufficient to associate him with the Brashler article. Moreover, since The Times presumably did not know of Arrington's background before publication, the lower court's reasoning makes the connection between a nonpublic person and an article of public interest turn on the wholly fortuitous circumstance of the publisher having

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12. While the photographer acted at the request of The Times in taking Arrington's photograph, he apparently did not know of the nature of the article with which Arrington's picture would be published. *See* Malyon, *The Fateful Photograph*, CAMERA ARTS, Oct. 1982, at 91-92.

selected the "right" photograph. Paradoxically, if Arrington had been a well-dressed drug trafficker, the lower court's reasoning would have resulted in a cause of action against The Times. This Court's relevant cases call for reversal of this erroneous ruling.

The error made in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1970) of giving insufficient weight to a nonpublic person's interest in not being associated with media discussions of matters of public interest, corrected for defamation cases in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should also be corrected for privacy cases. *Compare Time, Inc. v. Hill*, 385 U.S. 374 (1967), *with Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In *Rosenbloom*, the Court extended the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) rule to all "matters of public or general interest." However, a rule granting blanket immunity for all nondefamatory uses of photographs when published with articles of public interest is unsound, because it provides little or no protection for the interest of a private person in not being associated with matters with which he has no connection, even if such matters are of public interest.

Recognizing this, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court "repudiated" the *Rosenbloom* decision. 3 *Restatement (Second) of Torts* § 652E, at 398 (1977). Putting aside an all-purpose public figure, which Arrington is not, *Gertz* makes clear that unless a person voluntarily or involuntarily becomes involved in a controversy of public interest, it is improper for the media to associate such person with that controversy.

Since *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which extended the "actual malice" standard to privacy actions, was decided before *Gertz* and thus does not reflect the balance struck in *Gertz*, and since the court below decided this case informed by an erroneous view of the weight to give the competing interests in this case, this Court should correct that error by making clear that the *Gertz* rules also apply to privacy actions. Absent a ruling from this Court, lower courts are not sure on "whether *Hill's* 'matters of public interest' rationale

survives *Gertz's* rejection of the 'public issue' test of *Rosenbloom*, at least when the plaintiff is a private individual." *Fitzgerald v. Penthouse Int'l. Ltd.*, 525 F.Supp. 585, 602 (D. Md. 1981). We submit that the *Gertz* rules do apply to privacy actions and, because of the lower court's contrary ruling, this is an appropriate case to so hold. *See Dresbach v. Doubleday & Co., Inc.*, 518 F.Supp. 1285, 1288 (D.D.C. 1981) ("Although the Supreme Court has had no occasion to decide [whether the *Gertz* ruling applies to privacy cases,] no reason appears to distinguish . . . privacy actions from defamation actions in this regard.") Application of the *Gertz* rules to this case would make it improper for Arrington to be associated with the Brashler article, requiring reversal of the decision below.

Arrington has never taken a public position by publication or use of the media on the nature of the contemporary black middle class. He cannot therefore be said to have voluntarily become involved in this subject matter of public interest. *Compare Fitzgerald v. Penthouse Int'l. Ltd.*, 525 F. Supp. 585 (D. Md. 1981) (person who has written about, and voluntarily appeared on "60 Minutes" to discuss, military applications of dolphin technology may be associated with article discussing that subject). Arrington cannot involuntarily be dragged into Mr. Brashler's discussion of the nature of the black middle class. The only thing that makes Arrington of public interest is The Times's decision that his appearance made him someone whose photograph they wished to publish with the Brashler article. By itself, such a decision cannot overcome Arrington's right to privacy. *See Cantrell v. American Broadcasting Cos., Inc.*, 529 F.Supp. 746, 758 (N.D. Ill. 1981).

Point II - Petitioner's Constitutional Right of Privacy Has Been Violated.

A Right of Privacy is Recognized Under the United States Constitution. A right to privacy under the federal Constitution is now firmly established. *See, e.g., Whalen v. Roe,* 429 U.S. 589, 598-99 n.23 (1977); *Roe v. Wade,* 410 U.S. 113, *reh'g denied,* 410 U.S. 959 (1973); *Rosenblatt v. Baer,* 383 U.S. 75, 91 (1966) (Stewart, J., concurring); *Griswold v. Connecticut,* 381 U.S. 479 (1965). *See also York v. Story,* 324 F.2d 450 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964); Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552a (1977)) ("the right to privacy is a personal and fundamental right protected by the Constitution of the United States..."). In failing to give Arrington a cause of action against The Times, the decision of the lower court violates the federal constitutional right of privacy.

Although first expressly recognized in *Griswold*, protection of privacy has had a long and distinguished history in the Court's opinions over a wide range of contexts. *See, e.g., FCC v. Pacifica Foundation,* 438 U.S. 726 (1978); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); *Roe v. Wade,* 410 U.S. 173, *reh'g denied,* 410 U.S. 959 (1973); *Stanley v. Georgia,* 394 U.S. 557 (1969); *Schneider v. Smith,* 390 U.S. 17 (1968); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Hickman v. Taylor,* 329 U.S. 495 (1947); *Olmstead v. United States,* 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Union Pacific R. Co. v. Botsford,* 141 U.S. 250 (1891); *Boyd v. United States,* 116 U.S. 616 (1886).

The recognition in constitutional law of a right to privacy reflects a legal affirmation of the deeply rooted moral belief in our society that each individual's liberty and autonomy concerning decisions over the use of his or her person is not lightly to be disregarded. *See Pavesich v. New England Life Ins. Co.,* 122 Ga. 190, 50 S.E. 68 (1905); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean*

Prosser, 39 N.Y.U.L. REV. 962 (1964); Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 50 S. CALIF. L. REV. 727, 729–31 (1982). No one, without consent, should have his or her person used by another for that other's purpose, unless there are compelling reasons warranting such use.[13] There are no compelling reasons to support The Times's use of Arrington's photograph. If The Times, in exercising its unquestionable right to publish articles such as Mr. Brashler's, deemed it advisable to include a private individual's photograph for illustration, it could have used alternatives that would not have resulted in a privacy violation. For example, The Times could have used the photograph of a person who would have granted consent,[14] or that of a model. No one has any legitimate interest, much less a constitutionally recognizable one, in seeing the photograph of Arrington published with the Brashler article.

Widely respected persons, members of this Court among them, have made forceful arguments in favor of a constitutional right to privacy. "The right to be let alone," wrote Justice Douglas in *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 467 (1952) (dissenting opinion), "is indeed the beginning of all freedom." Years before, Justice Brandeis had penned words expressing this similar profound idea: "[T]he right to be let alone — [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S 438, 478 (1928) (dissenting opinion).[15]

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13. Moreover, in other contexts this Court has made clear that no one against his or her wish should be associated with views with which he or she disagrees. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

14. Since the photographer was given the assignment in November 1978 and the article was published on December 3, 1978, there was ample time for The Times to have obtained a person who would have consented to use of his photograph.

15. In *Katz v. United States*, 389 U.S. 347 (1967), the dissenting views of Justice Brandeis in *Olmstead* became those of the Court.

In *Cox Broadcasting Corp.*, the Court recognized that

> powerful arguments can be made, and have been made, that however it may be ultimately defined there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.

420 U.S. at 487 (footnote omitted; emphasis in original). Although *Cox Broadcasting Corp.* upheld the right of the press to publish accurate information contained in public records, it expressly differentiated between that type of privacy claim and one based upon appropriation of a photograph, stating: "we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's photograph . . . ." *Id.* at 489. What was not at issue in *Cox Broadcasting Corp.* is squarely presented in this case.

The Required Element of State Action is Present in this Case. The court below erred in holding that there is no state action involved in this case. Denial of relief to Arrington by the state courts itself constitutes state action for purposes of the fourteenth amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 14–18 (1948); *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *Nader v. General Motors Corp.*, 57 Misc.2d 301, 305, 292 N.Y.S.2d 514, 518 (Sup. Ct. N.Y. County 1968), *aff'd on other grounds*, 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dep't 1969), *aff'd*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970). To paraphrase the Court's language in *New York Times Co. v. Sullivan*, although this is a civil lawsuit between private parties, the New York courts have applied a state rule of law which petitioner claims to violate his constitutional right of privacy. 376 U.S. at 265. While the Court's cases have applied this ruling in situations involving a constitutional defense, we submit, as the above-cited lower court cases correctly held, such ruling should be followed in a case, such as here, where plaintiff raises a constitutional claim.

There are additional reasons for finding state action against The Times. First, the Court has held that a private party performing a public function is subject to constitutional standards. *Marsh v. Alabama* 326 U.S. 501 (1946). Members of the media such as The Times clearly perform a public function. *See Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("[a] free press is indispensable to the workings of our democratic society"). As observed by one who enjoys a close relationship with the journalism profession: "I experienced the symbiotic relationship in Washington between media and government. Much as the journalist may resent it, he performs a partly governmental function." H. Kissinger, *White House Years* 21 (1979).

Second, the press is the "only organized private business that is given explicit constitutional protection." Address by Justice Stewart, Yale Law School (Nov. 2, 1974), *reprinted, except for opening courtesies, in* Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633 (1975). *See also Associated Press v. United States*, 326 U.S. at 29 (Frankfurter, J., concurring) (media "enjoy a unique constitutional position"). As such, the press properly enjoys especial constitutional privileges. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). With such especial constitutional privileges, there must be a "legal demand of greater accountability." Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 18–19 & n.60 (1980).

Finally, on the accepted theory that a private party performing a quasi-governmental function is subject to constitutional standards,[16] we submit that the business of news dissemination is sufficiently quasi-governmental that, when combined with the two points made above, a finding of state action against The Times is amply warranted. The press performs the function of a fourth, but independent, branch of government providing a check on official power. *See* Stewart, *Or of the*

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16. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

Press, 26 HASTINGS L.J. at 634; Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591-92 (1979); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM.B. FOUNDATION RESEARCH J. 521. Much as the actions of the three official branches of government are subject to constitutional standards to guard against the abuse of power, so too must the conduct of the press be limited by constitutional norms for the same reason. *See* Miller, *The William O. Douglas Lecture: Press Versus Privacy*, 16 GONZ. L. REV. 843, 850-51 (1981). In performing its public function an institution such as The Times possesses formidable power indeed. *See generally* H. Salisbury, *Without Fear or Favor: An Uncompromising Look at the New York Times* (1980).

Private individuals such as Arrington have no effective remedies, save for legal ones, against infliction of personal injury by a powerful media institution such as The Times. Since protection of the individual against the exercise of arbitrary and capricious power has traditionally been the function of the judiciary, this Court should hold that a powerful media institution enjoying especial constitutional privileges should be held to constitutional norms.[17]

CONCLUSION

In performing the vital function of providing the means by which the views expressed in the Brashler article were disseminated to the public, there was absolutely no need for The Times to have directed the other respondents to take and then for it to have published the picture of Arrington. Not only was

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17. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521, 629 n. 341 ("conventional analysis of the state-action question can support the conclusion that the editorial decisions of mass-media outlets are sufficiently analogous to, intertwined with, or supported by the exercise of power by the state to make them subject to First Amendment standards . . . ").

the use of Arrington's photograph a violation of his privacy, as the court below obviously recognized; it was also the manipulation of an individual in a way that makes him appear to be something he is not, that identifies him with views he does not share, that has brought him unsought and unwanted publicity by dragging him into a public controversy with which he has no connection, and that has adversely affected him in the eyes of his friends and professional colleagues, all of which were done only by The Times. Surely a nonpublic individual's right of privacy prohibits, and the press clause of the first amendment does not protect, the publication of Arrington's picture in the circumstances in which it was done.

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Court of Appeals of New York.

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Dated: November 15, 1982

APPENDIX A
Court of Appeals of New York Opinion and Order

ARRINGTON v NY TIMES CO. [55 NY2d 433]

Statement of Case

Clarence W. Arrington, Appellant, v The New York Times Company et al., Respondents.

Argued February 11, 1982; decided April 7, 1982

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 25, 1980, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (LOUIS OKIN, J.), entered in New York County, (1) granting a motion by defendants Contact Press Images, Inc., Gorgoni and Pledge to dismiss the complaint against them, (2) granting a motion by the defendant New York Times Company to dismiss the complaint against it, and (3) granting leave to the plaintiff to serve an amended complaint against the defendant New York Times Company for violation of the right to privacy not based on an alleged violation of sections 50 and 51 of the Civil Rights Law. The modification consisted of striking the leave to the plaintiff to serve an amended complaint.

Plaintiff's action for money damages and injunctive relief arose from the *New York Times Magazine's* nonconsensual publication of his photograph as the most prominent illustration of a feature article entitled "The Black Middle Class: Making It". The picture, apparently taken while Arrington was walking along a street in New York City, was prominently displayed across the cover of the publication. Arrington, whose name was not mentioned in the article, had no prior knowledge that the photograph had been taken, much less that it would be sold or published or that it would be used

in connection with this or any other article. Defendant The New York Times Company, which published the article, described it as a commentary on the role of the expanding black middle class, in the course of which its author concluded that this group has been growing more removed from its less fortunate brethren. Arrington, a young financial analyst, regarded the text of the article not only as controversial but as one expressive of views he does not credit or practice. He alleged that he and readers who knew him found it "insulting, degrading, distorting and disparaging". This, he alleged, subjected him to public scorn and ridicule. His complaint, sounding in tort, was predicated on three theories: violation of sections 50 and 51 of the Civil Rights Law, invasion of common-law right of privacy and a similar imposition on a constitutional right to privacy. Other than the publisher, joined as defendants were the photographer who took the picture at the behest of the Times, the photographic agency which allegedly handled the financial arrangements and the agency's president. All four defendants moved to dismiss the complaint for failure to state a cause of action.

The Court of Appeals modified by denying the motion by defendants other than the Times Company to dismiss the complaint, and, as modified, affirmed, holding, in an opinion by Judge FUCHSBERG, that a picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of sections 50 and 51 of the Civil Rights Law unless it has no real relationship to the article, and plaintiff's allegation that his views are not consonant with those of the author of the article does not bring him within the "real relationship" exception; that if plaintiff were to establish the truth of his allegations that the article subjected him to public scorn and ridicule, the acts in which the defendants other than the Times Company will have been proved to have engaged will have included that of a nonconsensual selling of the photograph constituting a commercialization of the photograph in furtherance of trade within the prohibitions of sections 50 and 51 of the Civil Rights Law; and that there is no decisional support for the existence of a common-law right of privacy, and there can be

no abridgment of a constitutional right to privacy since no State action is involved.

Arrington v New York Times Co., 78 AD2d 839, modified.

HEADNOTES

Civil Rights - Commercial Use of Photograph Without Consent - Use of Photograph in Article of Public Interest

1. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging violations of sections 50 and 51 of the Civil Rights Law, which ban the use for advertising purposes or for purposes of trade of the name, portrait or picture of a living person unless that person's written consent has first been obtained, the complaint is dismissed as against the defendant publisher; a picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute unless it has no real relationship to the article, and plaintiff's allegation that his views are not consonant with those of the author of the article does not bring him within this "real relationship" exception.

Civil Rights - Commercial Use of Photograph Without Consent

2. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging violations of sections 50 and 51 of the Civil Rights Law, which ban the use for advertising purposes or for purposes of trade of the name, portrait or picture of a living person unless that person's written consent has first been obtained, a motion to dismiss the complaint for failure to state a cause of action by the photographer who took the picture, the agency which handled the financial arrangements and the

agency's president, is denied; were plaintiff to establish the truth of his allegations that the article, which expressed views that he does not credit or practice, subjected him to public scorn and ridicule, the acts in which one or more of these defendants, as opposed to the publisher of the article, will have been proved to have engaged will have included that of a non-consensual selling of the photograph constituting a commercialization of the photograph in furtherance of trade within the prohibitions of sections 50 and 51 of the Civil Rights Law.

Civil Rights - Commercial Use of Photograph Without Consent - Right of Privacy

3. In an action for money damages and injunctive relief arising from a newspaper magazine's publication of plaintiff's photograph as the most prominent illustration of a feature article, alleging invasion of a common-law right of privacy and a similar imposition on a constitutional right to privacy, a motion to dismiss the complaint for failure to state a cause of action is granted; there is no decisional support for the existence of a common-law right of privacy, and there can be no abridgment of a constitutional right to privacy since no State action is involved.

POINTS OF COUNSEL

Herve Gouraige, Donald J. Zoeller, John J. Kirby, Jr., and *Douglas M. Parker* for appellant. I. The complaint states a cause of action under sections 50 and 51 of the Civil Rights Law (*Thompson v Close-Up, Inc.*, 277 App Div 848; *Pierrottie v Dell Pub. Co.*, 199 F Supp 686; *Murray v New York Mag. Co.*, 27 NY2d 406; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Binns v Vitagraph Co. of Amer.*, 210 NY 51; *Dallesandro v Holt & Co.*, 4 AD2d 470, 7 NY2d 735; *Koussevitzky v Allen, Towne & Heath*, 188 Misc 479, 272 App Div 759; *Lahiri v Daily Mirror*, 162 Misc 776; *Sutton v Hearst Corp.*, 277 App Div 155.) II. The complaint states a cause of action for common-law invasion of privacy. (*Moore v New York El.R.R. Co.*, 130 NY 523; *Schuyler v Curtis*, 40 NY St Rep 289, 64 Hun 594, 54 NY

St Rep 936, 147 NY 434; *Marks v Jaffa*, 6 Misc 290; *MacKenzie v Soden Min. Springs Co.*, 27 Abb NC 402; *Kujek v Goldman*, 150 NY 176; *Wolston v Reader's Digest Assn.*, 443 US 157; *Hutchinson v Proxmire*, 443 US 111; *Owen v Partridge*, 40 Misc 415; *Spahn v Julian Messner, Inc.*, 43 Misc 2d 219, 23 AD2d 216, 18 NY2d 324, vacated and remanded *sub nom. Julian Messner, Inc. v Spahn*, 387 US 239, 20 NY2d 752, 21 NY2d 124, 393 US 1046; *Geisler v Petrocelli*, 616 F2d 636.) III. The complaint states a cause of action for violation of State and Federal constitutional rights to privacy. (*Barrows v Jackson*, 346 US 249; *Shelley v Kraemer*, 334 US 1; *Galella v Onassis*, 353 F Supp 196; *Nader v General Motors Corp.*, 57 Misc 2d 301, 31 AD2d 392, 25 NY2d 560; *Marsh v Alabama*, 326 US 501; *Associated Press v United States*, 326 US 1; *New York Times Co. v Sullivan*, 376 US 254; *Whalen v Roe*, 429 US 589; *Roe v Wade*, 410 US 113, 959; *Rosenblatt v Baer*, 383 US 75.)

Floyd Abrams, Dean Ringel, Howard G. Sloane, Richard Coll, Katherine P. Darrow and *George Freeman* for The New York Times Company, respondent. I. The courts below correctly ruled that the complaint fails to state a cause of action under sections 50 and 51 of the Civil Rights Law. (*Roberson v Rochester Folding Box Co.*, 171 NY 538; *Sidis v F-R Pub. Corp.*, 34 F Supp 19, 113 F2d 806; *Davis v Duryea*, 99 Misc 2d 933; *Callas v Whisper, Inc.*, 198 Misc 829, 278 App Div 974, 303 NY 759; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Rand v Hearst Corp.*, 31 AD2d 406, 26 NY2d 806; *Murray v New York Mag. Co.*, 27 NY2d 406; *Paulsen v Personality Posters*, 59 Misc 2d 444; *Pagan v New York Herald Tribune*, 32 AD2d 341; *Lahiri v Daily Mirror*, 162 Misc 776.) II. The court below correctly ruled that no common-law basis exists for plaintiff's claim. (*Cohen v Hallmark Cards*, 45 NY2d 493; *Wojtowicz v Delacorte Press*, 43 NY2d 858; *Kiss v County of Putnam*, 59 AD2d 773; *Eliah v Ucatan Corp.*, 433 F Supp 309; *Gautier v Pro-Football, Inc.*, 304 NY 354; *Cardy v Maxwell*, 9 Misc 2d 329; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196.) III. The court below correctly ruled that no constitutional basis exists for plaintiff's claim. (*Paul v Davis*, 424 US 693; *Reilly v Leonard*, 459 F Supp 291; *Katz v United States*,

389 US 347; *New York Times Co. v Sullivan*, 376 US 254; *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196; *N.A.A.C.P. v Button*, 371 US 415; *Rand v Hearst Corp.*, 31 AD2d 406; *Davis v Duryea*, 99 Misc 2d 933.)

Tennyson Schad for Contact Press Images, Inc., and others, respondents. The courts below correctly ruled that the complaint fails to state a cause of action against Gorgoni, Contact and Pledge.

OPINION OF THE COURT

FUCHSBERG, J.

This action, for money damages and injunctive relief, arises from the *New York Times Magazine's* nonconsensual publication of plaintiff Clarence W. Arrington's photograph as the most prominent illustration of a feature article entitled "The Black Middle Class: Making It". The magazine, a part of the Sunday edition of *The New York Times*, is circulated widely throughout City, State, and Nation, and elsewhere. The picture, apparently taken while Arrington was walking along a street in New York City, was prominently displayed across the cover of the publication. Arrington, whose name was not mentioned in the article, had no prior knowledge that the photograph had been taken, much less that it would be sold or published or that it would be used in connection with this or any other article. These facts are unquestioned.

Defendant The New York Times Company (hereinafter the Times), which published the article, in its brief describes it as a commentary on "the role of the expanding black middle/professional class in today's society", in the course of which, among other things, its author concludes that "this group has been growing more removed from its less fortunate brethren." Arrington, a young financial analyst, who then plied his profession with General Motors and now pursues it with the Ford Foundation, regards the text of the article not only as controversial but as one expressive of views he does not credit or practice. Moreover, as he alleges in this action, he and readers who knew him found it "insulting, degrading,

distorting and disparaging" not only of black persons of "middle class" status generally but also of himself, as its supposed exemplar, in particular. This, he goes on, subjected him to public scorn and ridicule, principally either because others quite reasonably took the article's idea to be ones he shares or because it was assumed that he at least in part had changed his vocation to that of professional model.

Plaintiff's complaint, sounding in tort, was predicated on three theories: violation of sections 50 and 51 of New York's Civil Rights Law,[1] invasion of common-law right of privacy and a similar imposition on a constitutional right to privacy. Other than the publisher, joined as defendants were Gianfranco Gorgoni, a free-lance photographer who took the picture at the behest of the Times, Contact Press Images, Inc., the photographic agency which allegedly handled the financial arrangements under which Gorgoni did so and Robert Pledge, Contact's president. In due course, all four defendants moved under CPLR 3211 (subd [a], par [7]) to dismiss the complaint for failure to state a cause of action.

Special Term was of the view that sections 50 and 51 will not support a charge of "actionable commercial exploitation where the picture is published in connection with an article of

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1. Section 50 reads as follows: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor".

Section 51, as amended last in 1921 (L 1921, ch 501) makes a violation of section 50 actionable in a civil suit. It specifically provides, as relevant to this case, that "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

general interest". On that premise plus the additional rationale that in the end it was the Times alone and not its three codefendants who were "responsible for the publication [and placement] of the picture", it dismissed against all the defendants. Nevertheless, in obeisance to what it sensed was an emerging "right to be let alone, sometimes referred to as [a] constitutional right of privacy", it granted plaintiff leave to serve an amended complaint against the Times on grounds other than those spelled out by sections 50 and 51.

[1–3] On cross appeals by Arrington and the Times, the Appellate Division, finding no decisional support for the existence of a common–law right of privacy and that the circumstances here do not come within the orbit of any constitutional protection, modified on the law by deleting the leave to amend; Justice KUPFERMAN, in a sole partial dissent, relying on Prosser on Torts (4th ed, pp 812–813), thought Arrington had spelled out a cause of action for having been placed in a "false light in the public eye". On the present appeal, though, contrary to the holdings below, we believe the case should proceed against the individual defendants, we are of the view that the result reached as to the Times was correct.

Our analysis may well begin with sections 50 and 51. Facially, these statutes simply ban the use "for advertising purposes, or for the purposes of trade" of the name, portrait or picture of a living person unless that person's written consent has first been obtained. Yet, in light of the decisional event which led directly to their adoption, what their seemingly uncomplicated texts affirmatively provide must be said to have been overshadowed by what these do not say.

The statutory scheme was enacted as a direct response to *Roberson v. Rochester Folding Box Co.* (171 NY 538). In this oft–cited case, some 25,000 reproductions of a photograph of the infant plaintiff were distributed throughout the country without her knowledge or consent in order to advertise defendant's flour. Most significantly, in sustaining a demurrer to so much of the complaint as was framed in terms of a violation of an alleged right to privacy, the court broadly denied the existence of such a cause of action under New York common

law. It is noteworthy, therefore, that, while concern engendered by this decision prompted the Legislature to enact sections 50 and 51, these were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy.

Nor has the Legislature chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the court's consistent adherence to its position that, as such, in this State "there exists no so-called common-law right to privacy" (*Cohen v Hallmark Cards*, 45 NY2d 493, 497, n 2; see, also, *Wojtowicz v Delacorte Press*, 43 NY2d 858; *Gautier v Pro-Football, Inc.*, 304 NY 354, 358).

[1] Moreover, this narrow reading of the statutory provisions has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy for purposes of "advertising" or "trade" and, on the other, the values our State and Federal Constitutions bespeak in the area of free speech and free press. Thus, we not too long ago reiterated that "'[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute *** unless it has no real relationship to the article *** or unless the article is an advertisement in disguise'" (*Murray v New York Mag. Co.*, 27 NY2d 406, 409 [magazine cover photograph illustrating a feature story], quoting from *Dallesandro v Holt & Co.*, 4 AD2d 470, 471, app dsmd 7 NY2d 735). And this holds true though the dissemination of news and views is carried on for a profit or that illustrations are added for the very purpose of encouraging sales of the publications (see *Pagan v New York Herald Tribune*, 26 NY2d 941, affg 32 AD2d 341, 343; *Callas v Whisper, Inc.*, 198 Misc 829, affd 278 App Div 974, affd 303 NY 759; *Oma v Hillman Periodicals*, 281 App Div 240, 244; *Paulsen v Personality Posters*, 59 Misc 2d 444, 447-448

[FRANK, J.]; *Lahiri v Daily Mirror*, 162 Misc 776 [SHEINTAG, J.]).

Now it can hardly be questioned that the article in this case, dealing as it does with the circumstances and tensions incident to yet another example of the mobility our country prides itself on encouraging within and among our societal groups, relates to a subject of "public interest", clearly a term to be freely defined (see *Lahiri v Daily Mirror, supra*, at p 782). Accepting that proposition, plaintiff nevertheless seeks to bring himself within the "no real relationship" exception referred to in our *Murray* decision. To this end, he does not deny that, by external and objective criteria, such as race, educational background, professional status, personal poise and habit of dress, he may be perceived to be a member of "the black middle class". Indeed, he does not dispute that the picture used by the Times portrays no more than what one might expect an upper or "middle class" man of good taste and attire, whatever the color of his skin, to look like.

Plaintiff's emphasis, rather, is on the fact that, as he reads it, the article depicts the "black middle class" as one peopled by "materialistic, status-conscious and frivolous individuals without any sense of moral obligation to those of their race who are economically less fortunate", a conception of the "class" with which he disclaims any "legitimate connection".[2] While the concededly innocuous title of the article is superimposed over part of the picture (as is the title of another on Christmas pleasures), nothing of the ideas with which he wishes to disassociate himself appear at this point. And, though the article itself gives the names and quotes the statements and opinions of persons whom the author

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2. Without in any way detracting from the reasonableness of the impression gathered by the plaintiff from his evaluation of the article as a whole, we note that its author, William Brashler, also expressed the opinion that "some of the 'haves' in the new black middle class are keeping up the fight, trying to find jobs for black kids, keep them out of trouble, deal with drugs, teach some skills, make black life for poor blacks bearable, offset the lure of the hustle. Every city in the country has its private and public agencies *** full of sharp, dedicated, mostly middle-class black staffers and volunteers".

interviewed, as indicated earlier, the plaintiff is neither mentioned, nor are any of the ideas or opinions it expresses attributed to him. The asserted lack of a "real relationship" boils down then, to his conviction that his views are not consonant with those of the author. But this disagreement cannot extend the compass of sections 50 and 51 for, in such matters, it would be unwise for us to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is agreement with views expressed on a social issue.

No more persuasive is plaintiff's perfectly understandable preference that his photograph not have been employed in this manner and in this connection. However, other than in the purely commercial setting covered by sections 50 and 51, an inability to vindicate a personal predelection [sic] for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely.

For related reasons, plaintiff's "false light" formulation[3] cannot save his complaint. There has been serious concern that, by sidestepping the safeguards which restrain the reach of traditional public defamation litigation, a false light approach could compromise the constitutional guarantee of freedom of the press (see Prosser, Torts [4th ed], p 813; Restatement, Torts 2d, §652E, Comment *d*, particularly p 399; Wade, Defamation and the Right of Privacy, 15 Vand L Rev 1093, 1121). Responsively, the Restatement, which in 1933 suggested that to impose liability under the false light rubric a publication need but be "offensive to persons of ordinary sensibilities" (Restatement, Torts, §867, Comment *d*), by 1976 had raised the threshold to a "highly" offensive level (Restatement, Torts 2d, §652E, Comment *c*). Suffice it here

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3. (1 Street, Foundations of Legal Liability, p 319; Prosser, Privacy, 48 Cal L Rev 383, 398, 400; Wigmore, Right Against False Attribution of Belief or Utterance, 4 Ky LJ [No. 8] 3; Wade, Defamation and The Right of Privacy, 15 Vand L Rev 1093, 1094, 1120; McKenna, False Light: Invasion of Privacy, 15 Tulsa LJ 113, 114.)

that, even assuming, but not now deciding, that such an action is cognizable in this State, by no means does this case measure up to this kind of criterion.

[1,2] However, while plaintiff's complaint therefore was properly dismissed as a matter of law insofar as it purported to proceed against the Times, at this stage it cannot be said that plaintiff has no claim under these statutes against defendants Gorgoni, Pledge or Contact.

In this connection, it must be remembered that the motion to dismiss, one made under CPLR 3211 (subd [a], par 7), was never converted by notice to one for summary judgment as permitted by CPLR 3211 (subd [c]). In this procedural posture, the allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment (see *Rovello v Orofino Realty Co.*, 40 NY2d 633). The complaint here, aside from reciting facts as to the publication of the photograph and plaintiff's ensuing damages, in substance alleges that Gorgoni took the picture; that Contact, in the business of buying and selling reproduction rights of photographs, had then been commissioned by Gorgoni to sell his pictures; that Pledge was the Contact officer and employee through whom Contact, acting for Gorgoni, sold the Times the picture, the proceeds being divided between Contact and Gorgoni.

[2] True, the affidavits and exhibits these defendants submitted in support of the motion denied important aspects of the roles plaintiff ascribed to Contact and Pledge, but this did no more than create issues of fact. After all, unlike the position of the Times, none of the other three defendants played the part of publisher of the article which plaintiff's photograph accompanied. Were the plaintiff to establish the truth of his allegations, the acts in which one or more of these defendants will have been proved to have engaged will, plainly and simply, have included that of a nonconsensual selling of the photograph. Thus, operating independently from the publisher, each at that point would have "commercialized the photograph" in "furtherance of [his] trade" (*Holmes v Underwood & Underwood*, 225 App Div 360, 362). That the

sale was to a publisher of news and articles on matters of public interest would not, in and by itself, have clothed these defendants with the publisher's immunity from the reach of sections 50 and 51. Consequently, the motion to dismiss the complaint to the extent that it pleads a violation of sections 50 and 51 on the part of each of these three defendants should have been denied.

[3] The statutory claims behind us, and the unavailability of those sounding in common-law privacy apparent, we now turn to the plaintiff's attempt to advance still another cause of action, posited this time on alleged abridgment of a constitutional right to privacy. To that end, no more need here be said than that, since no State action is involved, plaintiff's constitutional claim must fail.

Accordingly, the order of the Appellate Division should be modified, with costs to plaintiff against defendants Contact Press Images, Inc., Robert Pledge and Gianfranco Gorgoni, in accordance with this opinion, and, as so modified, it should be affirmed, with costs to defendant The New York Times Company against plaintiff.

JASEN, GABRIELLI and JONES, JJ. (concurring). We concur in result in this case but cannot accept what appears to us to be the overbreadth of Judge FUCHSBERG'S opinion, addressing as it does plaintiff's false light formulation which is not necessary for the resolution of this appeal.

Chief Judge COOKE and Judge MEYER concur with Judge FUCHSBERG; Judges JASEN, GABRIELLI and JONES concur in result in a concurring memorandum; Judge WACHTLER taking no part.

Order modified, with costs to plaintiff against defendants Contact Press Images, Inc., Pledge and Gorgoni, in accordance with the opinion herein and, as so modified, affirmed, with costs to defendant The New York Times Company against plaintiff.

APPENDIX B

Court of Appeals of New York Orders
Denying Reargument Motions

1	Mo. No. 540	Motion by defendants Contact
Clarence W. Arrington, Appellant, vs. The New York Times Company, et al., Respondents.		Press Images, Inc., Gorgoni and Pledge for reargument denied. Motions by Time Inc., et al., Associated Press, and American Society of Picture Professionals, Inc., et al., for leave to file briefs amici curiae on motion for reargument, denied. Judge Wachtler took no part.
DECISION COURT OF APPEALS July 2, 1982		

	Mo. No. 578	Application by plaintiff for extension of the time within which to move for reargument denied.
Clarence W. Arrington, Appellant, vs. The New York Times Company, et al.,		Motion by plaintiff for reargument dismissed as

Respondents.

untimely, with twenty dollars costs and necessary

DECISION COURT OF APPEALS

reproduction disbursements

July 2, 1982 to defendant The New York Times Company.

Judge Wachtler took no part.

APPENDIX C

Supreme Court of New York,
Appellate Division, First
Department Opinion and Order

CLARENCE W. ARRINGTON, Respondent-Appellant, v NEW YORK TIMES COMPANY, Appellant-Respondent, and CONTACT PRESS IMAGES, INC., et al., Defendants-Respondents. — Order, Supreme Court, New York County, entered April 7, 1980, which granted the motion of the defendants Contact Press Images, Inc., Gianfranco Gorgoni, and Robert Pledge to dismiss the complaint against them and granted the motion of the defendant *New York Times* to dismiss the complaint against it but granted leave to the plaintiff to serve an amended complaint against the *New York Times* for violation of the right to privacy not based on an alleged violation of sections 50 and 51 of the Civil Rights Law, modified, upon the law, to the extent of striking the leave to the plaintiff to serve an amended complaint, and otherwise affirmed, without costs or disbursements. An article on the black middle class was published in the Sunday magazine section of the *New York Times*. A photograph of the plaintiff, not named, appeared on the cover of the section with a caption calling attention to the article inside. Claiming that he had never consented to the taking of the photograph, that the article was neither about him nor was he so much as mentioned in it, and that he strongly disagreed with its thesis, the plaintiff brought action for invasion of his right to privacy against the newspaper, the freelance photographer, the photographic agency and its president. His action claimed a constitutional and common-law right to privacy as well as such a right under sections 50 and 51 of the Civil Rights Law. (Pursuant to the leave granted by Special Term, plaintiff has served an amended complaint asserting a constitutional and common-law right to privacy.) Special Term ruled correctly that plaintiff has no cause of action under the Civil Rights Law, but neither does he have a cause of action for violation of a common-law or constitutional right of privacy. It has been consistently held in

New York that there is no right to relief for invasion of privacy other than the statutory right granted by the Civil Rights Law (*Cohen v Hallmark Cards*, 45 NY2d 493; *Wojtowicz v Delacorte Press*, 43 NY2d 858). It may well be, as plaintiff maintains, that the Court of Appeals, when next confronted with the issue, will recognize a common-law right to privacy. Meanwhile, constraining precedent compels the holding by this court that no such right presently exists. No constitutional right to privacy authorizes this action. Where a constitutional right to privacy exists, it is to protect against governmental action or intrusion into purely familial matters (see *Roe v Wade*, 410 US 113; *Whalen v Roe*, 429 US 589; *Griswold v Connecticut*, 381 US 479). Efforts to expand this right beyond this scope have been rejected (see *Paul v Davis*, 424 US 693). Concur—Sullivan, Lupiano, Lynch and Carro, JJ.

Kupferman, J. P., dissents in a memorandum as follows: I would affirm the granting of leave to the plaintiff to serve an amended complaint against the *New York Times*. I would do this on a ground different from that stated by the court at Special Term. The plaintiff spells out a cause of action for violation of his right of privacy considered in Prosser's Law of Torts ([4th ed], pp 812–813) as "False Light in the Public Eye": ("Another form in which it frequently appears is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection, with the implication that such a connection exists—as where, for example, the face of an honest taxi driver is used to ornament a story about the cheating propensities of taxi drivers in the city. Still another is the inclusion of the plaintiff's name, photograph or fingerprints in a public 'rogue's gallery' of convicted criminals, when he has not in fact been convicted of any crime. The false light need not necessarily be a defamatory one, although it very often is, so that a defamation action will also lie.") The article printed in the Sunday magazine section of the *New York Times* of December 3, 1978, entitled "The Black Middle Class—Making It", was considered by some to be controversial, and the plaintiff found it offensive. However, the cover of the magazine used his photograph to illustrate the article, even though he had no connection

whatever with the article, and, in fact, had no knowledge that his photograph would be used. Under the circumstances, he should be allowed to plead that cause of action. (See *Leverton v Curtis Pub. Co.*, 192 F2d 974, 978.)

APPENDIX D

Supreme Court of New York,
New York County (Special Term) Opinion

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

CLARENCE W. ARRINGTON,

Plaintiff,

-against-

Index No.
12009/79

THE NEW YORK TIMES CO.
CONTACT PRESS IMAGES, INC.
GIANFRANCO GORGONI AND
ROBERT PLEDGE,

Defendants.

OKIN, J.:

Plaintiff instituted this action claiming injury and damages as a result of the publication of full-length color picture of plaintiff on the front outside cover of the New York Times Magazine Section on Sunday, December 3, 1978. The picture was published with a caption reading "The Black Middle Class: Making it," which referred to an article bearing that title written by one William Brashler which was published in that issue of the New York Times Magazine Section.

Plaintiff had never consented that his picture be taken or published. Indeed, plaintiff did not even know that his picture was being taken and claims that his first knowledge of the fact that the picture was taken and was being published was in the

early morning of Sunday, December 3, 1978, when he was called and was informed by one of his business associates.

Plaintiff was born on December 31, 1951, a native of Montgomery, Alabama. He did undergraduate work at Morgan State University. He attended Columbia Graduate School of Business and obtained a Masters of Business Administration in May of 1977. Plaintiff then became associated with General Motors as a Financial Analyst and was employed in that capacity in December 1978 when the picture was published.

Plaintiff's picture had never appeared in any news media and plaintiff had never been subject of any public discussion or notority [sic] and could not be considered a public figure.

Plaintiff's name is not mentioned in the article and there is no reference to plaintiff in the article that the picture could be connected with other than, as claimed by defendants, that plaintiff's photograph was an example of the upward mobility of the Black Middle Class.

The central character of the article is a Black prostitute, now turned receptionist. The theme of the article is that there is a growing Black Middle Professional Class who are increasingly flourishing and giving evidence of being less and less concerned about the plight of their more unfortunate Black brothers.

The article, which plaintiff's picture on the front of that edition of the New York Times Magazine Section was supposed to illustrate, refers to materialistic and status-conscious, aspiring Middle Class Blacks and emphasizes the concern of members of this class with three-piece Pierre Cardin suits and the acquisition of expensive foreign cars, such as the Mercedes-Benz.

Plaintiff, in his complaint, charges violation and infringement by defendants of plaintiff's rights under Sections 50 and 51 of the N.Y. Civil Rights Law and also impingement

by defendants upon plaintiff's common law right of privacy and plaintiff's constitutional right of privacy.

The defendant, the New York Times Company (Times) and the other defendants moved to dismiss the complaint upon the ground that plaintiff has no justiciable complaint which can be based upon the defendant's use and publication of plaintiff's photograph, relying principally upon the decisions in Murray v. NY Magazine, 27 NY2d 406; Dallesandro v. Holt & Co., 4 AD2d 470; app. dismissed, 7 NY2d 735; Pagan v. NY Herald Tribune, Inc., 32 AD2d 341, 343.

The complaint alleges that defendants used and published plaintiff's picture for purposes of trade and to promote the sale of the Times Magazine and alleges that the publication of plaintiff's picture, in the manner used, was intended and did convey the impression that plaintiff was a model who had posed for the taking of the picture or photograph.

Plaintiff further alleges that the publication of plaintiff's picture on the outside cover of the Times Magazine Section subjected plaintiff to undesirable comment from friends and acquaintances and has been a source of embarrassment to plaintiff among his business associates.

Plaintiff claims that the publication of his photograph conveyed the impression that plaintiff was in accord with the views and the themes expressed in the Brashler article, which plaintiff asserts he disagrees with and finds to be degrading and disparaging to Black persons who have achieved Middle Class status. Plaintiff alleges that he has been offended and humiliated and that he has been exposed to public ridicule and contempt and caused to suffer great mental distress.

Defendants argue that in the absence of a claim of libel — and there could be none here for plaintiff's name is never used in the article nor is there any reference to plaintiff in the article — the mere fact that plaintiff might find the article in question with which his photograph was used offensive and humiliating does not give plaintiff the right [to] seek redress in

the courts; that the decisions on this subject in New York require a dismissal of this complaint.

Sections 50 and 51 of the Civil Rights Law were enacted to prevent the commercial exploitation of a person's name or photograph without his written consent. Warren & Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193.

Where improper use of a name or picture is at issue, the courts have consistently concluded that defendants cannot be charged with actionable commercial exploitation where the picture is published in connection with an article of general interest. Lahiri v. Daily Mirror, 162 M. 776, 295 S 382.

"A picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute ... unless it has no real relationship to the article ... or unless the article is a advertisement in disguise." Dellasandro v. Henry Hold & Co. 4 A.D. (2) 470, where the picture of plaintiff, a longshoreman, was published without his consent on the jacket of the biography of the "Waterfront Priest."

In Murray v. New York Magazine Co., 27 N.Y. (2) 406, plaintiff's picture, in St. Patrick's Day regalia, was presented on the outside cover of the New York Magazine.

In both cases, the court held that the placing of the picture on the outside cover of the publication — as the Times did with Mr. Arrington's picture — does not establish that the picture was used for trade or advertising purposes, and the fact that the sales of the publication may have been incidentally affected did not support plaintiff's legal rights under Sections 50 and 51 of the Civil Rights Law.

Here, however, at least as far as the defendant Times is concerned, plaintiff goes further. The complaint alleges that plaintiff, a recent MBA graduate working as a Financial Analyst for General Motors, was humiliated, distressed and emotionally upset by the sudden and unauthorized publication

of his picture on the outside cover of the New York Times Magazine Section.

Generally, where a person attends a public event, he cannot complain where his picture is incidentally published — even without his consent — in an article dealing with or relating to that event. LaFarge v. Fairchild Publication, Inc. (1965) 23 A.D.(2) 636. However, even in such a situation, while his picture may be taken and used as part of the general audience, his picture cannot be picked out and unduly featured. Gautier v. Pro-Football, Inc. (1952) 304 NY 354.

Persons who achieve success or special attention in their field can also expect public discussion, and the use of their picture under such circumstances is not actionable. Klein v. McGraw Hill, Inc., (1966) 263 F. Supp. 919 (plaintiff, a high school student achieved special recognition in the field of radio communication); Oma v. Hillman Periodicals, Inc. (1953) 281 A.D. 240 (plaintiff was a well known boxer); Delinger v. American News (1958) 6 A.P. (2) 1027, 178 S. (2) 221 (plaintiff was a well known physical training instructor and his picture was used to illustrate an article on that subject..

These cases are in line with the doctrine established in Sidis v. F-R Pub. Corp. (1938) 34 F. Supp. 19, 24; aff'd 113 F(2) 806 (2nd Cir. 1940), where the court rejected the claims asserted on behalf of a once boy genius who had conscionably changed his life style. The court recognized that under the mores of our days the public is entitled to unfettered discussion in the attempt to answer the question: "Where are they now?".

All of this flows from the recognition that Sections 50 and 51 of the Civil Rights Law must not be construed "to curtail the right of free speech or free press." Rand v. Hearst Corp., 31 AD(2) 406, 409. This statute was not intended to limit the dissemination of news or proscribe information concerning matters of public interest. Paulsen v. Personality Poster (1968) 59 M(2) 444, 299 S(2) 501.

The conflict arises in attempting to balance the public interest in the free dissemination of information against one's private interest in the preservation of his inviolate personality. Thompson v. Close Up, Inc. (1950) 278 A.D. 431.

The right to be let alone is a right that has been recognized as one of the most highly valued privileges of a civilized man. Olmstead v. U.S. 277 U.S. 438.

This right of a person to be able to make decisions relating to his person and his life style and place in society has been the basis for the recognition of Constitutional safeguards affecting many matters. Numerous recent decisions have given judicial recognition and enforcement to the concept of personal rights and private rights as guaranteed by the Constitution in matters relating to marriage, procreation, child rearing, contraception, family relationships, social relationships and education.

The opening of a person's mail by agents of the C.I.A. was condemned for the violation of the recipient's personal and private rights. Birnbaum v. U.S. (1978) 588 F(2) [sic] 319.

Jacqueline Onassis' private and personal rights were the basis for enjoining harrassment by a photographer. Galella v. Onassis, (1973) 487 F(2) [sic] 986, 353 F. Supp. 196.

Personal and private rights were sustained enjoining electronic wiretapping. Spock v. U.S. (1978) 464 F. Supp. 510.

The private rights of the plaintiffs warranted curbing surveillance and intrusion by government agents. Socialist Workers Party v. Atty Gen (1978) 463 F. Supp. 515.

While freedom of the press must be zealously protected and any attempt to censor or restrict the press must be guarded against, it is essential that in the process the private rights of citizens be protected particularly where a specific situation does not involve the need of fair comment, or freedom of expression.

Here, to sustain the right of the Times to publish plaintiff's picture without his consent and to deny him the right to claim that this act on the part of the Times humiliated and distressed plaintiff, to plaintiff's damage, would be a gross misuse of the concept of freedom of the press. Such a result would go far beyond the need for fair comment or dissemination and reasonable discussion of matters of public interest.

The right of privacy has been recognized as an independent Constitutional right. In Roe v. Wale [sic] (1973) 410 U.S. 113, this personal right, to make decisions regarding one's own person, was the basis of sustaining the right of a woman to attack abortion laws which restricted her right freely to terminate her pregnancy.

This same Constitutional right of privacy was invoked in a case dealing with drug restricting statutes. Whalen v. Roe, (1977) 429 U.S. 589, 598.

And, recently, here in New York, the Appellate Division, 4th Department referred to and recognized this independent Constitutional right of privacy as the basis for declaring that the right to freedom of action in the privacy of one's own home, even where admittedly there was deviate sexual behavior between consenting adults, required the upsetting, on Constitutional grounds, of a statute proscribing consensual sodomy. People v. Onofre, App. Div., 4th Dep., NYLJ 2/5/80 p. 4.

On the basis of Murray v. New York Magazine Co., 27 N.Y. (2) 406 and Dellasandro v. Henry Hold & Co., 4 A.D. (2) 470 and similar cases, plaintiff cannot sustain a recovery for alleged commercial exploitation of his picture. To the degree that plaintiff seeks to recover damages for a claim of violation by defendants of plaintiff's rights under Section 50 and 51 of the Civil Rights Act, plaintiff cannot succeed in New York.

However, there have been enough adjudications to warrant sustaining plaintiff's right to recover damages for the

violation of his right to be let alone, sometimes referred to as plaintiff's Constitutional right of privacy.

Plaintiff had as much right to decide that he did not want publicity and that he did not want his picture plastered on the front of the New York Times Magazine Section as did the individuals whose personal rights were involved in the various cases cited, where a Constitutional right of privacy was recognized.

Plaintiff should have the right to plead a cause of action limited to a breach of this Constitutional right of privacy, which — as plaintiff claims — resulted in his distress and humiliation and to establish such damages as plaintiff can prove.

The activities of the defendants other than the Times related wholly to the taking of the picture. The Times was responsible for the publication of the picture and the decision to place the picture on the front of the New York Times Magazine Section.

Accordingly, the motion by defendants to dismiss the complaint is granted and plaintiff is given leave to serve an amended complaint, which shall not be based upon the alleged violation of Sections 50 and 51 of the Civil Right Law, only against the New York Time [sic].

The complaint against the other defendants is dismissed without leave to replead.

Dated: March 6, 1980 /s/ Louis J. Okin

J.S.C.

APPENDIX E

Order of Justice Marshall Extending Time to File Petition for Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-285

CLARENCE W. ARRINGTON,
Petitioner,
v.
THE NEW YORK TIMES COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1982

/s/ Thurgood Marshall

Associate Justice of the
Supreme Court of the
United States

Dated this 21st
day of September , 1982

APPENDIX F

Constitutional Provisions Involved

The first amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Constitution of the United States of America 911 (L.S. Jayson, Supervising ed. 1973).

The third amendment provides:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Id. at 1037.

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seàrches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. at 1041.

The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. at 1089.

The ninth amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Id. 1257.

The fourteenth amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Id. at 1303.

APPENDIX G

State Statutory Provisions Involved

Sections 50 and 51 of the New York Civil Rights Law

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with

his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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No. 82-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLARENCE W. ARRINGTON,

Petitioner,

v.

THE NEW YORK TIMES COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION OF THE NEW YORK TIMES COMPANY

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December 15, 1982

Questions Presented

1. May this Court review a decision of the New York Court of Appeals dismissing a privacy action assertedly based on New York State statutes and New York common law, when the Court of Appeals held that established principles of state law provided no basis for relief and required dismissal?

2. Whether the New York Court of Appeals erred in concluding that the United States Constitution does not require the recognition of a novel constitutional right of privacy against a private newspaper which uses a photograph of an individual in connection with and to illustrate a related article of public interest?

Parties Below

The parties to the proceedings below were Clarence W. Arrington, plaintiff, and The New York Times Company*, Gianfranco Gorgoni, Robert Pledge and Contact Press Images, Inc., defendants.

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* As required by Supreme Court Rule 28.1, The New York Times Company ("The Times") advises the Court that it has no subsidiaries or affiliates incorporated under the laws of any of the United States other than wholly-owned subsidiaries, except Northern SC Paper Corporation.

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Constitutional and Statutory Provisions:

The First Amendment to the Constitution and the provisions of the Constitution upon which petitioner premises his assertion of a constitutional right of privacy are set forth in the Appendix to the Petition.

Statutes:

Sections 50 and 51 of the New York Civil Rights Law (McKinney 1976 & Supp. 1982-83) are set forth below:

§ 50. *Right of privacy*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting

in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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BRIEF IN OPPOSITION OF THE NEW YORK TIMES COMPANY

Opinions Below

The opinion of the New York State Supreme Court, New York County (Special Term), granting respondents' motion to dismiss petitioner's complaint, but granting petitioner leave to serve an amended complaint against The New York Times Company ("The Times"), is not officially reported, but is unofficially reported at 5 Media L.Rep. (BNA) 2581 (Sup.Ct. N.Y. Co. 1980), and is set forth as Appendix D to the petition. The opinion and order of the New York State Supreme Court, Appellate Division, First Department, which modified Special Term's decision by striking petitioner's leave to serve an amended complaint, and which otherwise affirmed the order of Special Term dismissing petitioner's causes of action, is reported at 78 A.D. 2d 839, 433 N.Y.S.2d 164 (1st Dep't 1980), and is set forth

as Appendix C to the petition. The opinion and order of the Court of Appeals of New York, affirming the Appellate Division's decision concerning the dismissal of the complaint against The Times, and modifying the decision as regards defendants Gianfranco Gorgoni ("Gorgoni"), Robert Pledge ("Pledge") and Contact Press Images, Inc. ("Contact Press"), so as to reinstate petitioner's statutory causes of action against these latter three respondents, is reported at 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), and is set forth as Appendix A to the petition. That court's order dismissing petitioner's motion for reargument as untimely and denying certain respondents' motion for reargument is unreported, and is set forth as Appendix B to the petition.

Jurisdiction

The petition purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3)(1976).

Such jurisdiction is contested by respondent.

1. Although the petition recites that "[a] timely petition for reargument" of the decision of the New York Court of Appeals was filed and "denied" (Pet. 2)* it does not note that petitioner's own motion for rehearing was dismissed by that court as untimely; the order of dismissal is set forth in App. B, p. 36. A timely petition for reargument was made by the respondents other than The Times, but it is not clear that the liberality of this Court's Rule 20.4 was intended to render timely a petition for certiorari based on one party's timely request for rehearing where the petitioner himself made an untimely application for reargument and thereafter failed to file a petition within 90 days

* Reference to "Pet. ...." is to the Petition for Certiorari at the indicated page.

of the original decision or seek an extension of that time before its expiration as required by Rule 29.2 of this Court.*

2. No jurisdiction exists with respect to the first question presented by the petition under 28 U.S.C. § 1257(3) because the New York Court of Appeals concluded that the applicable law of New York did not support the state statutory and common law claims advanced by petitioner. The court premised its decision on the well developed body of state law and not on any conclusion that the United States Constitution "prohibits recognition" of plaintiff's claims as the petition asserts. There was no decision made with respect to the United States Constitution or the "treaties or statutes of, or commission held or authority exercised under the United States" with respect to this question and hence no jurisdiction to review this matter. This deficiency is dealt with at greater length in Part I of the argument in this Brief in Opposition.

Statement of the Case

In this action, petitioner sought recovery for alleged violations of his right of privacy which he attributes to the use of a photograph of petitioner on the cover of an issue of the Sunday magazine section of *The New York Times*. Petitioner's action for damages and injunctive relief for injuries allegedly incurred as a result of the publication of the photograph was predicated on Sections

* The Court of Appeals decided the case on April 7, 1982. Accordingly, petitioner had until July 6, 1982 to file a petition or to seek an extension of time to do so. Respondents Contact Press Images, Inc., Gorgoni and Pledge timely sought reargument of the New York Court of Appeals and that motion was denied on July 2, 1982. On that same date plaintiff's motion for reargument was "dismissed as untimely" by the New York Court of Appeals. Petitioner did not seek an extension of time from Justice Marshall until September 17, 1982.

50 and 51 of the New York Civil Rights Law and on New York common law and constitutional grounds. In addition to The Times, the complaint named as defendants (i) Gorgoni, the freelance photographer who allegedly took the photograph at issue, (ii) Contact Press, the photographic agency which supplied the photograph to The Times, and (iii) Pledge, the president of the agency.

The Article Published In Connection With The Photograph In Question

The photograph of petitioner appeared on the cover of The Times' December 3, 1978 Sunday magazine section. As petitioner explicitly acknowledged in his complaint, it was published "in connection" with an article entitled "The Black Middle Class: Making It", written by William Brashler. The article presented the author's analysis of a social issue of unquestioned significance—the role of the expanding black middle/professional class in today's society.

The article which the cover photograph illustrated discussed the rapid growth and upward mobility of "an American black middle/professional class". It portrayed the lives of some of the members of this class, including an industrial relations manager, a journalist, a receptionist and a public relations executive. Among the themes in the article were that the black middle/professional class is "flourishing and swelling", that because of the diversity of careers and lifestyles "it [is] increasingly difficult today to define a 'black community' ", that in general the mobile middle class "is carving a distinct identity for itself", that it is growing more removed from its less fortunate brethren though many middle class blacks have not lessened their concern for poorer blacks, and that the resultant relationships between middle/professional class blacks and whites, and among black men and women, have become more complex.

Proceedings Below

Petitioner commenced this action by the service of a summons and complaint dated June 26, 1979. On September 5, 1979, The Times timely served a motion pursuant to Rule 3211(a)(7) of the New York Civil Practice Law and Rules (McKinney 1970) (the "CPLR") to dismiss the complaint on the grounds that it failed to state a cause of action. The Times contended that since, under long established New York precedent, Sections 50 and 51 of the New York Civil Rights Law provide the exclusive remedy in New York State to a party complaining of the unauthorized publication of a photograph, petitioner's common law and constitutional causes of action for invasion of privacy should be dismissed. The Times further argued that since the photograph was not used for "advertising purposes, or for the purposes of trade" as those statutory terms have been defined by the New York courts, petitioner's claims under Sections 50 and 51 of the New York Civil Rights Law (McKinney 1976 & Supp. 1982-83) should also be dismissed. On September 14, 1979, the three other respondents also moved to dismiss the complaint on the ground, *inter alia*, that it failed to state a cause of action, incorporating The Times' memorandum of law in support of their motion.

On March 7, 1980, the New York State Supreme Court (Special Term), New York County (per Louis Okin, Acting Justice), entered a memorandum decision granting respondents' motion to dismiss the complaint, but also granting petitioner leave to serve an amended complaint against The Times excluding claims of alleged violations of Sections 50 and 51 of the New York Civil Rights Law.

On April 8, 1980, The Times served and filed its Notice of Appeal of Special Term's decision.

On November 25, 1980, the New York State Supreme Court, Appellate Division, entered an order which modi-

fied Special Term's decision by striking petitioner's leave to serve an amended complaint based on alleged constitutional and common law privacy grounds. The Appellate Division otherwise affirmed the order of Special Term dismissing the petitioner's cause of action under Sections 50 and 51 of the New York Civil Rights Law, and stated in an accompanying opinion, "Special Term ruled correctly that plaintiff has no cause of action under the [New York] Civil Rights Law, but neither does he have a cause of action for violation of a common law or constitutional right of privacy."

The New York Court of Appeals, on April 7, 1982, entered an order affirming the decision of the Appellate Division insofar as it dismissed all the causes of action alleged in petitioner's complaint against The Times and those causes of action asserted against the remaining respondents that were based on constitutional or common law grounds.* In reaching its decision with respect to the claim asserted under the state statute, the Court of Appeals traced the origins of the statute to its own 1902 decision rejecting any New York common law basis for a privacy claim, *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538 (1902) (Pet. App. 30-31). The Court of Appeals said that in response to that decision the legislature enacted a statute "narrowly drafted" to "encompass only the commercial use" of a "name or likeness and no more." (Pet. App. 31)

Given this narrow scope, the Court of Appeals noted that, except in certain circumstances, newspaper use of a photograph to illustrate an article of public interest would not normally be considered a use for "advertising" or "trade", the terms of the statute. It dealt with the long

* The Court of Appeals reinstated that part of petitioner's complaint which asserted causes of action against Gorgoni, Contact Press and Pledge based on Sections 50 and 51 of the New York Civil Rights Law.

line of New York cases so holding and the narrow exceptions to that general rule, specifically concluding (Pet. App. 32-33) that the petitioner's situation does not fit within the scope of the statute. The court also stated that no common law claim for privacy has been recognized in New York. (Pet. App. 31) Finally, the court rejected plaintiff's claim that a constitutional right of privacy had been abridged by publication, stating that "since no State Action is involved, plaintiff's constitutional claim must fail." (Pet. App. 35)

On May 10, 1982, petitioner served and filed a motion for reargument in the New York Court of Appeals, which The Times opposed, *inter alia*, on the grounds that said motion was untimely under Rule 500.9(f) of the Rules of the New York Court of Appeals.* In response to The Times' brief in opposition to the motion for reargument, petitioner filed an application before the New York Court of Appeals for an extension of time within which to move for reargument. On July 2, 1982, the New York Court of Appeals denied petitioner's application for an extension of time within which to move for reargument, and dismissed petitioner's pending motion for reargument as untimely. The petition to this Court followed after petitioner had sought on September 17, 1982 and obtained on September 21, 1982 an extension of time in which to file.**

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* Rule 500.9(f) requires that a motion for reargument be served not later than 30 days after the appeal or motion for which reargument is sought has been decided. Since the New York Court of Appeals' decision on which petitioner sought reargument was rendered on April 7, 1982, service of the motion for reargument on May 10, 1982 was untimely.

** It is respectfully submitted that the present petition is untimely in light of the petitioner's failure to file or seek an extension of time to do so within 90 days of the April 7, 1982 decision of the Court of Appeals. See Rules 20.4 and 29 of the Rules of this Court. The factual predicate for this is set forth under the "Jurisdiction" section of this Brief.

REASONS FOR DENYING THE WRIT

1.

The New York Court of Appeals Decision Holding That Petitioner's Complaint Failed to State A Cause of Action Under New York's Statutory and Common Law Was Based on Adequate and Unreviewable State Grounds.

The petition asserts that "The New York Court of Appeals was obviously of the erroneous view that a privacy action against the Times would violate the first amendment." (Pet. 10) Neither at this point nor elsewhere does the petition point to any language by the Court of Appeals adopting such "view". In fact, the Court did not offer any such observation, let alone premise its decision on such conclusion. Instead, the decision of the Court of Appeals denying petitioner's statutory and common law claims was based explicitly on that court's longstanding rejection, as a matter of New York law, of any common law right of action for invasion of privacy and its almost equally longstanding, narrow interpretation of the statutory exception to the common law, an interpretation, which the court notes, was well known to and undisturbed by the New York legislature. The decision of the Court of Appeals as to the common law and statutory claims of petitioner was premised directly upon the established law of New York.

The tenuousness of petitioner's attempt to turn an interpretation of New York law into a federal constitutional ruling is reflected in the petition's explanation of why the decision must have been grounded in the Constitution: "the only *plausible* reason the court below reached this result [dismissal of the complaint] was its incorrect view that the First Amendment bars a cause of action against the

Times." (Pet. at 10 (emphasis supplied)) Apparently because petitioner is unpersuaded by the Court of Appeals' dispositive application of New York law with respect to the statutory and common law claims, petitioner would infer that some other, unstated rationale must underlie the decision. This is an unacceptable basis upon which to base the jurisdictional predicate for review by this Court.

Petitioner's statutory claim was grounded on Sections 50 and 51 of the New York Civil Rights Law, which prohibit the use of the name, portrait or picture of any living person, without consent, when that use is "for advertising purposes, or for the purposes of trade." Thus, as a threshold matter, the Court of Appeals had to determine whether The Times' use of petitioner's photograph met the statutory requisites of Sections 50 and 51.

The Court of Appeals noted that the origin of the statute can be traced to the court's own rejection of a common law action for privacy in *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538 (1902). In that case the court declined to grant a right of action to a young girl whose picture had been used on 25,000 commercial advertisements for flour. The legislature responded by the passage of Sections 50 and 51 of the New York Civil Rights Law. As Judge Fuchsberg, writing for a unanimous court, emphasized, these sections

> "were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy." 55 N.Y.2d at 439, 434 N.E.2d at 1321, 449 N.Y.S.2d at 943 (Pet. App. 31).

Significantly, the Court of Appeals noted the legislature has not

> "chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the Court's consistent adherence to its position that, as such, in this state 'there exists no so-called common-law right to privacy' . . . ." 55 N.Y.2d at 440, 434 N.E.2d at 1321, 449 N.Y.S.2d at 943 (Pet. App. 31).

Thus, the narrowness of Sections 50 and 51 has been established since its enactment "fourscore" years ago, well before the Supreme Court of the United States first suggested that the First Amendment restricted the states. *See Gitlow* v. *United States*, 268 U.S. 652 (1925).*

The opinion of the Court of Appeals went on to note, in its only reference to the federal Constitution with respect to the statute, that the narrow reading "has not been without sensitivity" to the "potentially competing" nature of the values at issue, on the one hand the protection of privacy against invasion for purposes of "advertising" or "trade" and on the other "the values our State and Federal Constitutions bespeak in the area of free speech and free press." 55 N.Y.2d at 440, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 31). This general concern for free speech values, providing an additional policy basis for the narrow interpretation of a statute already in place even before the First Amendment was applied to the states, and acquiesced in over the years by the legislature, hardly supports an

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* That the need for a narrow interpretation of Sections 50 and 51 was recognized in New York long before the First Amendment was thought applicable to the states is made clear by the early interpretation of the statute. *See Moser* v. *Press Pub. Co.*, 59 Misc. 78, 81, 109 N.Y.S. 963, 965 (Sup. Ct. Sullivan Co. 1908) (declining to apply statute broadly to newspapers); *cf. Humiston* v. *Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1st Dep't 1919).

assertion that the Court of Appeals held the "First Amendment bars a cause of action."

Indeed the Court of Appeals set forth explicitly what it held did bar petitioner's claim—his inability to come within the long-established interpretation of what constitutes "trade" or "advertising" within Sections 50 and 51:

> "Thus, we not too long ago reiterated that '"[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise"' (*Murray* v. *New York Mag. Co.*, 27 NY2d 406, 409 [magazine cover photograph illustrating a feature story], quoting from *Dallesandro* v. *Holt & Co.*, 4 AD2d 470, 471, app dsmd 7 NY2d 735). And this holds true though the dissemination of news and views is carried on for a profit or that illustrations are added for the very purpose of encouraging sales of the publications (*see Pagan* v. *New York Herald Tribune*, 26 NY2d 941, affg 32 AD2d 341, 343; *Callas* v. *Whisper, Inc.*, 198 Misc 829, affd 278 App Div 974, affd 303 NY 759; *Oma* v. *Hillman Periodicals*, 281 App Div 240, 244; *Paulsen* v. *Personality Posters*, 59 Misc 2d 444, 447-448 [FRANK, J.]; *Lahiri* v. *Daily Mirror*, 162 Misc 776 [SHEINTAG, J.])." 55 N.Y.2d at 440, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 31-32).*

Recognizing the consistent interpretation of New York law, Judge Fuchsberg, speaking for a unanimous Court of

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* The *Murray* case, relied upon by the court, involved the court's rejection of a very similar claim under Sections 50 and 51 by an individual whose photograph had been used on the cover of a magazine. *Murray*, like the the present decision, was premised on statutory, not constitutional grounds. *See Murray* v. *New York Magazine Co.*, 27 N.Y.2d 406, 409, 267 N.E.2d 256, 258, 318 N.Y.S.2d 474, 476 (1971).

Appeals, dismissed petitioner's effort to fit within these long-established exceptions. The opinion noted that the article was clearly a subject "of public interest" under New York's standards and that notwithstanding petitioner's efforts to claim the absence of a "real relationship" between article and photograph, petitioner did not deny that by external and objective criteria "he may be perceived to be a member of 'the black middle class' "—the subject of the article. 55 N.Y.2d at 441, 434 N.E.2d at 1322, 449 N.Y.S. 2d at 944.

> "Plaintiff's emphasis, rather, is on the fact that, as he reads it, the article depicts the 'black middle class' as one peopled by 'materialistic, status-conscious and frivolous individuals without any sense of moral obligation to those of their race who are economically less fortunate', a conception of the 'class' with which he disclaims any 'legitimate connection'." 55 N.Y.2d at 441, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 32) (footnote omitted).

The court continued:

> "The asserted lack of a 'real relationship' boils down then, to his conviction that his views are not consonant with those of the author. But this disagreement cannot extend the compass of sections 50 and 51 for, in such matters, it would be unwise for us to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is agreement with views expressed on a social issue." 55 N.Y.2d at 441, 434 N.E.2d at 1322-23, 449 N.Y.S.2d at 944-45 (Pet. App. 33).

Petitioner's claim under New York common law faced an even more difficult obstacle. As Judge Fuchsberg said:

> "[I]n this State 'there exists no so-called common law right to privacy' (*Cohen* v. *Hallmark Cards*, 45 N.Y.2d

493, 497, n.2; *see, also, Wojtowicz* v. *Delacorte Press*, 43 N.Y.2d 858; *Gautier* v. *Pro-Football, Inc.*, 304 N.Y. 354, 358)." 55 N.Y.2d at 440, 434 N.E.2d at 1321-22, 449 N.Y.S.2d at 943-44 (Pet. App. 31).*

The opinion of the New York Court of Appeals does not suggest a bar under the First Amendment to petitioner's causes of action, but rather holds that petitioner has failed to state a cause of action for which New York statutory or common law provides relief. The decision below regarding petitioner's statutory and common law claims is based on adequate and nonreviewable state grounds.

This Court has made clear it will not review a state court judgment based upon an adequate and independent state ground, since:

> "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

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* Judge Fuchsberg also rejected petitioner's assertion of a "false light" type of privacy claim. Such claims, if cognizable at all in New York, have been cognizable only under Sections 50 and 51 which the court found unavailable here. Further, after examining the facts alleged by petitioner concerning the use of his photograph with reference to the standards for a "false light" claim set out in the Restatement (Second) of Torts, § 652E (1977), Judge Fuchsberg pointed out that, "even assuming, but not now deciding, that such an action is cognizable in [New York], by no means does this case measure up to this kind of criterion." 55 N.Y.2d at 442, 434 N.E.2d at 1323, 449 N.Y.S.2d at 945 (Pet. App. 34). Three other judges concluded that this additional discussion of false light was unnecessary to the dismissal and concurred separately on this point.

Accord, Berea College v. *Kentucky,* 211 U.S. 45 (1908); *Murdock* v. *City of Memphis,* 87 U.S. (20 Wall.) 590 (1874); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935). This principle has been adhered to even where a decision rested on both adequate state and federal grounds for, if the state court rested its decision "upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller, supra,* 296 U.S. at 210. Where, as here, the decision of the New York Court of Appeals relating to petitioner's statutory and common law claims rests solely upon a consideration and interpretation of New York statutes and case law, there can be no doubt that adequate state grounds exist, precluding review of this portion of the decision below by this Court.*

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* Petitioner's invitation to this Court to review the decision of the New York Court of Appeals on the grounds that ". . . the court below decided this case informed by an erroneous view of the weight to give the competing interests in this case, [and that] this Court should correct that error by making clear that the *Gertz* rules also apply to privacy actions" is wholly inappropriate. Not only is the question of the fault standard to be applied after *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974) and *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) not raised in any of the decisions below, but it is an issue not germane to a resolution of the case. Petitioner's complaint alleged that respondents' use and publication of the photograph was accomplished "recklessly, knowingly, unlawfully and without the prior knowledge, consent or permission, oral, written, or otherwise, of plaintiff. . . ." Notwithstanding these assertions, presumably raising both constitutional malice and negligence, the courts below found that petitioner's complaint failed to state a claim upon which relief could be granted. Thus, the issue of the distinction between two standards of "malice" and "negligence" is simply not raised here. The afterthought nature of this point is in some senses highlighted by the fact that petitioner has not even chosen to include the complaint in his appendix.

2.

The New York Court of Appeals Correctly Ruled that the Constitution Does Not Create A Right of Action For Petitioner Here.

Petitioner's argument in Point II of the petition that ". . . [i]n failing to give [petitioner] . . . a cause of action against The Times, the decision of the lower court violates the federal constitutional right of privacy" rests on a series of propositions which have been rejected by this Court in strikingly similar cases.

It should be noted at the outset that the petitioner's brief does not discuss this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), which rejected a privacy claim made by an individual whose photograph had been included by the police as part of a list of "Active Shoplifters." The Court concluded that this distribution did not involve a deprivation of a constitutional right. With respect to the privacy claim, the Court stated:

> "While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power. See *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968). And our other 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'funda-

> mental' or 'implicit in the concept of ordered liberty' as described in *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.* In these areas it has been held that there are *limitations* on the States' power to substantively regulate conduct." 424 U.S. at 712-13 (emphasis supplied).

Petitioner's present claim, like that in *Paul* v. *Davis*, *supra*, is not based "upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private'" (*id.* at 713). It is thus clear that a constitutional right of privacy could have no application in the present circumstances.

In every case in which this Court has recognized a constitutional claim for invasion of privacy, an essential element of the claim is a challenge to the "'state's power.'" *Paul* v. *Davis*, *supra*, 424 U.S. at 713. There must be state action before there can be a constitutional violation. The court below so held and petitioner does not challenge this. Instead he argues that the power of the press is such that it should be treated as government. This theory stands the Constitution on its head. It has been soundly rejected by this Court.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this Court unanimously rejected the argument that the power of the press with respect to the shaping of public opinion permits regulation of the press in the name of the First Amendment. The press of this nation was protected by the Constitution so that it could remain "forever free to censure the Government." *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (*per*

curiam) (Black, J., concurring); it remains a critic, not a branch, of the government.*

No more supportable is petitioner's claim that "denial of relief . . . by the state courts itself constitutes state action for the purpose of the Fourteenth Amendment" (Pet. 19). Petitioner is forced to acknowledge that none of the cases he cites directly supports his assertion here; and none does. There are cases, such as *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in which state action is found in rules *imposing* liability in private civil suits, where state law altered the status quo of the parties. Contrary to petitioner's allegation that "the New York Courts have applied a state rule of law which petitioner claims to violate his constitutional right of privacy" no such rule has been applied. The state has simply held that its law does not limit the relations between private parties in this area. This is quite literally, government non-action. Were petitioner's view of state action the law, every private suit in which a complaint was dismissed by the state courts would give rise to a potential constitutional claim. The absurdity of the approach is reflected in the absence of case law support.

Even were government action sufficient to trigger constitutional inquiry present, the fact is, of course, that this case involves an area far removed from the intimate, familial areas to which the Court in *Paul* v. *Davis* referred and

* Lower federal courts which have considered demands that a constitutional "right of privacy" be recognized as against newspapers have, like the New York Court of Appeals, rejected it. Thus in *Reilly* v. *Leonard*, 459 F.Supp. 291, 299 (D.Conn. 1978), the court held that "[t]he right to be free from unwarranted and unwanted publicity" is not protected by the Constitution and that protection of such privacy interest, if any, must be left to the States. The court, in reaching this result, relied on *Katz* v. *United States*, 389 U.S. 347, 350-51 (1967), which expressly recognized that protection of privacy against non-governmental intrusion—the "right to be let alone by other people—is . . . left largely to the law of the individual States." (Footnotes omitted.)

which has provided the focus of privacy concern in this Court. *See e.g., Roe* v. *Wade,* 410 U.S. 113 (1973) [government restrictions on abortion]; *Zablocki* v. *Redhail,* 434 U.S. 374, 375, 385 (1978) [government limitation on marriage by those not supporting children]; *Carey* v. *Population Services Int'l,* 431 U.S. 678, 684-85 (1977) [government limits birth control information]; *Moore* v. *City of East Cleveland,* 431 U.S. 494, 499 (1977) [impact of government zoning law on family]; *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639-40 (1974) [school board restrictions on work by pregnant teachers]; *Whalen* v. *Roe,* 429 U.S. 589 (1977) [Court rejected claim of privacy based on government dissemination of private information]. There is no basis for imposition of a novel federal constitutional right of action here.

Indeed, recognition of such a federally mandated right of action here would itself raise issues of constitutional significance as to freedom of speech and press. This Court has expressed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), and, as a consequence, has imposed vigorous limits on liability for even false and defamatory speech. Permitting liability to be based upon the use of a photograph illustrating an article of social significance, solely because petitioner disagrees with the point of view advanced in the article, would irreparably diminish the "profound national commitment" recognized by this Court.

Moreover, the imprecise and boundless constitutional privacy "cause of action" apparently urged by the petitioner would work profound mischief even if its basic theory were not seriously in error, for "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

The State of New York has chosen to extend protection to privacy as set forth in its statutes. It has declined to extend them to cover the present situation. There is authority neither in the Constitution nor in sound policy for this Court to impose the rigidity of a federal right of action in an area of such sensitive concern. The unanimous and well-reasoned opinion of the Court of Appeals should not be disturbed.

CONCLUSION

For the reasons set forth above, it is submitted that the petition presents no basis for the granting of the writ by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLARENCE W. ARRINGTON,
Petitioner,

vs.

THE NEW YORK TIMES COMPANY, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of New York

PETITIONER'S REPLY BRIEF

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Dated: December 30, 1982

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PETITIONER'S REPLY BRIEF

In accordance with this Court's rule 22.5, this reply brief is filed on behalf of petitioner Clarence W. Arrington ("Arrington"), and responds to arguments first raised in the Brief in Opposition of The New York Times Company ("Brief in Opposition").

In summary, Arrington points out herein that under this Court's rule 20.4 the timely filing of a reargument motion below (by respondents other than The Times) tolled Arrington's time to file a certiorari petition; that because the New York Court of Appeals recognized a cause of action under the New York privacy statute against all respondents except The Times – which requested Arrington's photograph to be taken by the other respondents and then published it – the purported state law ground is inadequate to support the decision below; that the decision below was plainly based upon the first amendment; and that requiring the New York courts to uphold the federal constitutional right of privacy by recognizing Arrington's cause of action against The Times would entail permissible post-publication liability for tortious invasion of privacy, and not impermissible governmental regulation of the media.

I. THE TWO JURISDICTIONAL OBJECTIONS LACK MERIT

A. A Timely Reargument Motion by Any Party Tolls the Time for Filing a Certiorari Petition for All Parties.

The Times argues that "it is not clear that the liberality of this Court's Rule 20.4 was intended to render timely a petition for certiorari based on one party's timely request for rehearing where the petitioner himself made an untimely application for reargument...." Brief in Opposition at 2. Rule 20.4 provides in relevant part:

> [I]f a petition for rehearing is timely filed by *any party in the case*, the time for filing the petition for writ of certiorari for *all parties* (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing..." (emphasis added).

As The Times concedes (Brief in Opposition at 2), and as indicated in the petition, a timely motion for reargument was made in the New York Court of Appeals by respondents other than The Times.[1] That motion was denied on July 2, 1982. More

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1. As indicated in the order reproduced in Appendix B to the petition, Arrington's reargument motion was denied by the lower court as being untimely. While the New York Court of Appeals has authority under the express terms of its rules to permit filing of a reargument motion beyond its normal time period, *see* Rules of Practice of the Court of Appeals of the State of New York, N.Y. Admin. Code title 500, § 500.9(d) (eff. Jan. 1981); H. Cohen & A. Karger, *The Powers of the New York Court of Appeals* § 106, at 443–44 (rev. ed. 1952), and Arrington requested permission to do so, Arrington's reargument motion, as requested by The Times, was denied as being untimely.

The lower court first decided the case on April 7, 1982. (This decision is reproduced in Appendix A to the petition.) Under that court's rules, a reargument motion, if not made on or before Friday, May 7, 1982, could be made thereafter with court permission. On May 7, 1982, respondents other than The Times made their reargument motion. On Monday, May 10, 1982, Arrington made a cross-motion for reargument. *See* N.Y. Civ. Prac. Law §§ 101 & 2215 (McKinney 1972 & 1974).

Arrington's reargument motion argued that even on the basis of the lower court's April 7 decision, granting a privacy cause of action against respondents except The Times, he was entitled to proceed against The Times

than ten (10) days before the time to file the certiorari petition (Sup. Ct. R. 29.2), a motion was made in this Court to extend such time to and including November 15, 1982. As indicated in the petition, on September 21, 1982 Justice Marshall signed an order granting the extension. As provided in that order, the petition was timely filed on November 15, 1982.

B. The Decision Below was Based on the First Amendment Because the Result Cannot be Supported by an Adequate State Law Ground.

The brief filed by The Times is noteworthy for its failure to address the anomaly of the decision by the New York Court of Appeals in dismissing Arrington's claim against The Times while sustaining his claims against the other respondents. As shown in the petition, this anomaly can be explained only by the fact that the court below believed – incorrectly – that the first amendment compelled a dismissal of the claim against The Times.[2]

The Times is wrong in arguing that the nonfederal ground is independent of the first amendment. In its decision, the New York Court of Appeals stated:

> [T]his narrow reading of the statutory provisions has not been without sensitivity to the...values our State and Federal Constitutions bespeak in the area of free speech and free press (Appendix at 31).

As this quote and others cited in the petition reveal (Cert. Pet. at 7–8), "at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe...its own law in the manner it did."

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on the following alternative grounds: (1) as agents of The Times, liability of the other respondents would render The Times derivatively liable, or (2) because of the complaint's allegation of concerted action, all respondents were jointly and severally liable.

2. Quoting language from the decision below, Arrington has previously argued that the ruling is based on the first amendment. Petition for Writ of Certiorari at 7–8 & 10–13 ("Cert. Pet."). He respectfully refers the Court to that decision, which is reproduced in Appendix A of the petition, so that the Court may decide for itself which is the correct view.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). Thus even if state law "would have provided an adequate basis for the [decision below], the [New York Court of Appeals] did not intend to rest its decision independently on [state law] and [this Court therefore has] jurisdiction of this case." *Delaware v. Prouse*, 440 U.S. 648, 652 (1979).[3]

Because the decision below lacks "fair and substantial support" in prior New York law, as shown below, the state law ground is not adequate to support it.[4] *See Ward v. Love County*, 253 U.S. 17 (1920). "Supreme Court review cannot be evaded by a nonfederal ground 'so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question'." R. Stern & E. Gressman, *Supreme Court Practice* at 239 (quoting *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917)).

The New York privacy statute, which is reproduced in Appendix G of the petition, prohibits use within the state of any person's "portrait or picture" for "advertising purposes or for the purposes of trade..." without prior written consent.[5] Since dissemination of news is part of "trade,"[6] *see Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 472–73, 178 N.Y.S. 752, 756–57 (1st Dep't 1919); *Associated Press v. United States*, 326 U.S. 1, 6–7 & 19–20 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 128 & 130–33 (1937), publication of Arrington's photograph in New York without any consent falls squarely within the terms of New York privacy statute. As this Court recognized in *Time, Inc. v. Hill*, 385

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3. The language of the decision below is sufficiently ambiguous that a *Krivda* remand or a continuance to permit application to the court below for clarification of its opinion and remittitur would be appropriate at the very least. *See California v. Krivda*, 409 U.S. 33 (1972) (*per curiam*); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

4. This Court is, of course, the judge of whether or not the state law ground is adequate. *See* R. Stern & E. Gressman, *Supreme Court Practice* §3.31, at 231–32 (5th ed. 1978).

5. Arrington made it clear to the lower courts that he does not contend his photograph was used as part of an advertisement.

6. The New York privacy statute does not define "trade." Nor is a definition of that word to be found in New York's General Construction Law. *See* N.Y.Gen. Constr. Law §§10 *et seq.* (McKinney 1951) (Consol. 1980 & Cum. Supp. Dec. 1982).

U.S. 374, 381–82 (1967), the New York courts have "construed the statute . . . to authorize [in some circumstances, present here] a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent."

As shown below, well-established principles of New York privacy law provide a cause of action against The Times in this case. Yet, Arrington was granted a privacy cause of action against the other respondents, all of whom, the lower court recognized, acted at the behest of The Times, but was not granted a cause of action against The Times. Only an erroneous view of the requirements of the first amendment can explain this result. *Compare Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (publisher, but not photographer, liable for publication of private person's photograph with magazine article).

Ample New York precedents, all of which were cited to the court below, support Arrington's contention that his statutory right to privacy has been violated. *See, e.g., Sutton v. Hearst Corp.*, 277 A.D. 155 (1st Dep't 1950); *Thompson v. Close-Up, Inc.*, 277 A.D. 848 (1st Dep't 1932), *R. aff'd mem.*, 261 N.Y. 504 (1933); *Almind v. Sea Beach R. Co.*, 141 N.Y.S. 842 (2d Dep't 1913) (n.o.r.); *Spellman v. Simon & Schuster*, 3 Media. L. Rep. (BNA) 2406 (Civ. Ct. N.Y. County 1978) (n.o.r.); *Metzger v. Dell Publishing Co.*, 207 Misc. 182 (Sup. Ct. N.Y. County 1955); *Valerni v. Hearst Magazines, Inc.*, 99 N.Y.S.2d 866 (Sup. Ct. N.Y. County 1949) (n.o.r.); *Marks v. Jaffa*, 6 Misc. 290, 291–92 (N.Y. Superior Ct. 1893); *Pierrottie v. Dell Publishing Co.*, 199 F. Supp. 686 (S.D.N.Y. 1961). In *Marks*, the court stated: "No newspaper or institution, no matter how worthy, has the right to use the . . . picture of anyone . . . without consent." [7]

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7. Reliance by The Times on *Moser v. Press Publishing Co.*, 59 Misc. 78, 109 N.Y.S. 963 (Sup. Ct. Sullivan County 1908) as a case "declining to apply [the New York privacy statute] broadly to newspapers" is misplaced. Brief in Opposition at 10 n.*. In an influential decision, in and outside of New York (*see* S.H. Hofstadter & G. Horowitz, *The Right of Privacy* 45–46 (1964)), Justice Shientag in *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 782 (Sup. Ct. N.Y. County 1937) expressly disapproved of that part of *Moser* upon which The Times relies, stating:

> Some authorities have gone so far as to intimate that, apart from advertising, newspapers are altogether exempt from

In upholding a jury verdict for use of plaintiff's photograph in *Spellman*, the court stated:

> The plaintiff . . . had no connection with the subject matter of this book. Her picture was used because of her age and color for the purpose of attracting black purchasers.
>
> . . . .
>
> Any black young person's photograph could have been used.

Id. at 2407.

Similarly, in holding unlawful publication of the photograph of young boys not involved in crime to illustrate an article discussing juvenile crime, the court in *Metzger* stated:

> [Plaintiffs] were simply dragged into the article by the purely fortuitous circumstance that at the particular moment when this reporter ... appeared in their neighborhood in search of 'local color' they happened to be standing together.

207 Misc. at 185.

Indeed, the New York Court of Appeals, in a previous case, recognized that what was done to Arrington would violate the statute. *See Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359–60 (1952). In *Gautier*, the court below stated that "the individual may not be singled out and unduly featured merely because he is on the scene ...," *id.* at 359, and that "[o]ne traveling upon the public highway ... may not be picked out of a crowd alone ... and unduly featured for public view." *Id.* at 360.[8]

> the [New York privacy] statute, so far as publication in a single issue is concerned. [Citing *Moser*.] To so broad a rule, however, I do not subscribe.

8. *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971), relied on by The Times as a case where the court below rejected "a very similar claim . . . by an individual whose photograph had been used on the cover of a magazine" (Brief in Opposition at 11 n.*), is easily distinguishable. There, plaintiff, whose "practice each year [was] to attend the St. Patrick's Day Parade . . . attired in what has been regarded as typically Irish garb," had his photograph taken while attending

While New York law, as the above cases show, requires a "real relationship" between a nonpublic person and a publication of public interest to establish a first amendment privilege, and forbids singling out and unduly featuring of a person walking on a street, the court below in this case paid lipservice to those standards and proceeded to disregard them. Like the plaintiffs in *Metzger* and in *Spellman*, Arrington was dragged into the Brashler article by the fortuitous circumstance of his having been a well-dressed black person walking in the street at the time that Gorgoni, the photographer, was taking pictures on assignment for The Times. These circumstances refute any claim of a "real relationship" between Arrington and the Brashler article (Cert. Pet. at 13–16).

Thus, even if The Times were correct that the decision below rested on state law, the inadequacy of that basis unmistakably shows that the New York Court of Appeals "held as it did because it felt under compulsion of federal law . . . so to hold . . . ." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568 (quoting *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). By a reversal from this Court and remand, the lower court would "be relieved of that compulsion [and] freed to decide . . . [this case] according to its own local law." *Id.*

II. THE ARGUMENTS MADE BY THE TIMES AGAINST VINDICATION OF THE RIGHT OF PRIVACY IN THIS CASE ARE WRONG

The second question presented in the petition raises the issue of whether recognition of a constitutional right of privacy under the federal Constitution imposes an obligation on state courts in appropriate circumstances, present here, to vindicate such constitutional right.[9] Without challenging the Court's

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the Parade, and the photograph was then used in connection with a magazine article specifically discussing the St. Patrick's Day Parade.

9. The complaint alleged violation of Arrington's constitutional right of privacy.

jurisdiction, The Times opposes grant of the writ to consider that question on a purported lack of state action and on an argument that the constitutional right of privacy is limited to "familial areas."

While *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (emphasis added) held that protection of privacy is "left *largely* to the law of the individual states[,]" Dean Prosser has correctly pointed out that recognition of a right of privacy under the federal Constitution means that the states are not left entirely free to deny protection to privacy interests. Cert. Pet. at 10 n.9. Where, as determined by this Court, the state provides inadequate protection for a constitutionally recognized right, this Court must uphold the federal Constitution by requiring certain minimum standards that will pass constitutional muster. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). We submit that such minimum standards would require recognition of a privacy cause of action against The Times in this case.

The Times contends that Arrington's argument for a finding of state action based on application of a state rule of law (informed by first amendment considerations) to deny him a cause of action proves too much, because "every private suit in which a complaint was dismissed by the state courts would give rise to a potential constitutional claim." Brief in Opposition at 17. This argument is wrong for several reasons. Every private suit would not necessarily involve the following elements present in this case: a defendant that performs a public function and is a member of the media, which is the only organized private business that enjoys special constitutional privileges (Cert. Pet. at 20); and an issue concerning a right recognized under the federal Constitution.

The Times is also incorrect in contending that the position argued herein is devoid of case law support. Brief in Opposition at 17. Apart from the Special Term decision in this case, which held that Arrington had a constitutional right of privacy against The Times, at least two other cases, both of which are cited in the petition (Cert. Pet. at 19), have so held. *See Galella v. Onassis*, 353 F.Supp. 196, 231–33

(S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *Nader v. General Motors Corp.*, 57 Misc.2d 301, 305, 292 N.Y.S.2d 514, 518 (Sup. Ct. N.Y. County 1968), *aff'd on other grounds*, 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dep't 1969), *aff'd*, 25 N.Y.2d 560,307 N.Y.S.2d 647 (1970). In *Galella* the district court, relying on cases from this Court and other lower court decisions, held:

> The claim that this constitutional right [of privacy] runs only against 'state action' overlooks the fact that the act of a court—even the entry of a judgment denying relief—is state action within the meaning of the Fourteenth Amendment. [Citations omitted.] Hence, the denial of relief in this case—relief essential to vindicate a basic human and constitutional right—would itself violate the Constitution.

353 F.Supp. at 232.

Arguing that state action is absent, The Times mistakenly relies on *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), which is easily distinguishable. Applying the well-settled rule that pre-publication restraint can only be imposed on the press in extraordinary circumstances, *Tornillo* simply held that a state may not compel a newspaper to publish a statement without its consent. In contrast, post-publication liability, as for invasion of privacy, is clearly permissible. *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). Consistent with that, we submit that recognition of the constitutional right of privacy under the federal Constitution requires the New York courts, on the facts of this case, to grant Arrington a cause of action, thus imposing post-publication liability for tortious invasion of privacy. Moreover, while plaintiff in *Tornillo* sought to use the enormous power of the press and its fiduciary obligation to the public as bases for a governmentally regulated right of access to the media, Arrington seeks against the press a right to be left alone. No government regulation of the press is involved in the right Arrington seeks.

Without denying that a right of privacy is recognized under the federal Constitution, The Times contends that *Paul v. Davis*, 424 U.S. 693 (1976) restricted that right to "familial

areas." Brief in Opposition at 15–18. That view is clearly wrong. In *Paul v. Davis*, the Court simply held that an individual who had been arrested for shoplifting had no privacy claim because of police publication of his mug shot. This is an application of the Court's previous ruling in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) that there is no invasion of privacy resulting from disclosure of accurate information contained in public records.

That *Paul v. Davis* cannot be viewed as limiting the constitutional right of privacy to "familial areas" is shown by the fact that in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), decided after *Paul v. Davis*, the Court held that the "right of personal privacy includes 'the interest in independence in making the certain kinds of important decisions'," and that "the outer limits of this aspect of privacy have not been marked by the court...." 431 U.S. at 684.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Court of Appeals of New York.

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